Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *NLRB v. Baptist Hospital*, 442 U.S. 773, 775 (1979), this Court addressed a hospital's right to restrict union organizing on hospital grounds. This case presents several critical questions left open by those cases:

1. May a hospital adopt rules preventing its employees from approaching patients and their families with union-organizing issues and literature on hospital grounds?

2. Is it irrational for the National Labor Relations Board to presume that "patient care" in an acute care hospital occurs only in "patient rooms, operating rooms, and places where patients receive treatment," and not in sitting areas where patients and their families wait for, receive and reflect on medical advice and counseling?

3. In considering whether a hospital may prohibit union solicitation in an area, should ready availability of other areas of the hospital for solicitation and organizational activity be a factor?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Stanford Hospital and Clinics is a California nonprofit public benefit corporation that does not issue stock and has no parent corporation (its sole corporate member is the Trustees of Leland Stanford Junior University).

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STATEMENT OF JURISDICTION

The Court of Appeals' judgment was entered on May 15, 2003 (App. E). A timely petition for rehearing was denied on June 30, 2003 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), provides:

> It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.

STATEMENT OF THE CASE

A. Factual Background

This case raises important, unresolved questions concerning the permissible scope of hospital rules limiting employees in soliciting union support on hospital grounds.

This case involves two hospitals in Palo Alto, California—Stanford Hospital and Clinics ("Stanford Hospital") and Lucile Packard Children's Hospital ("Children's Hospital"). App. 35a, 36a. Both hospitals are acute care facilities. Each hospital sees and treats patients with life-threatening illnesses. Each hospital has an oncology unit, intensive care unit and organ transplant unit. App. 134a, 147a, 155a, 156a. The hospitals, although separately administered, are contiguous.

Both hospitals see family support as a critical part of patient care. This is particularly so in the case of the Children's Hospital. App. 123a. The hospital experience can be extremely punishing for parents of a sick or injured child. Treatment can inflict unavoidable pain and prolonged discomfort on an uncomprehending child. Being with the child at such times, which the hospital encourages for the child's benefit, takes a heavy toll on parents. App. 127a. At both facilities, but particularly at the Children's Hospital, families make the decisions concerning treatment. Particularly at the Children's Hospital, family members frequently remain in the hospital around the clock, sleeping in the patient room and staying with the patient during the day. All patients' rooms in the Children's Hospital have a bed in the room to allow parents to spend the night. App. 123a. The hospital has "day rooms" where family members can be with their child. App. 125a.

In both hospitals, the times of waiting for tests or results, the conferences with physicians, the process of absorbing the information received and making decisions can be difficult for patients and their families. The patient's room can become claustrophobic for patients and families and ill-suited to private conversation or reflection. More than 40 persons—employees and physicians—can enter a patient's room in a day for one purpose or another. Patients and families need additional places they can retreat to for relief from the room, for private conferences with physicians or for reflection on what is happening and what they are learning about the course of their treatment. App. 135a n.53.

On the patient floors, each hospital has separate medical specialty departments ("nursing units") connected by hallways. App. 86a. Some units at the Children's Hospital, such as intensive care, have sitting areas for patients and their families inside the doors of the nursing unit. App. 144a. In other nursing units, the family and patient sitting areas are outside the doors of the nursing unit in the connecting areas between units. Both hospitals use these sitting areas, regardless of whether they are inside or outside a nursing unit, for exactly the same purposes. Physicians use sitting rooms for private conferences with patients and families about the course of treatment. Families and patients use these areas for respite from patients' rooms; they wait for procedures or for results; they ponder treatment issues, and absorb and reflect on outcomes. Patients and family members are sometimes observed crying in these areas. Patients sometimes receive medication from staff in these rooms and medical exigencies have occurred in these areas, requiring staff to come to the aid of a patient, such as when an alarm sounds on a monitoring device. App. 144a, 145a, 148a-150a, 156a. Employees are not supposed to use these sitting areas

except to transport patients, to clean or otherwise to do assigned work. App. 141a.

The location of a waiting area outside a nursing unit does not mean that the patients and families in that area confront less serious medical issues or that the area has a different function. For example, at both hospitals, the transplant unit has waiting areas outside the boundaries of the nursing unit. App. 133a, 156a. At the Children's Hospital, the patient's room or the space inside the nursing unit may sometimes be inappropriate for conferences, decision-making, reflection or grief. App. 127a-128a, 135a n.53.

In November 1997, the Service Employees International Union, Local 715 AFL-CIO ("Union"), began an organizing drive in a unit of service and maintenance employees (excluding nurses, who were separately represented) at the two hospitals. During the campaign, hospital employees and full-time union organizers solicited both employees and non-employees inside and outside the hospitals, and distributed union literature to them. App. 115a.

Responding to these activities, the hospitals reissued a policy intended to avoid disrupting patient care and to prevent disturbing patients and their families. App. 117a. The policy prohibited solicitation of employees in "patient care areas at any time." App. 117a.

The rule defined "patient care areas" as "patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and other families or visitors and the hallways immediately adjacent to all such areas." App. 118a. Under this rule, solicitation of employees was permitted

throughout the ground floor of both hospitals, except the enclosed admitting areas, adjacent patient waiting areas and waiting areas next to the laboratory and pharmacy. Solicitation of employees was also permitted in both cafeterias, employee break rooms and lunch rooms, in all hallways on all floors not immediately adjacent to "patient care" areas and all areas outside the building. App. 121a.

The rule further provided that "employees are prohibited from soliciting and distributing literature to non-employees (patients, visitors, etc.) at any time on UCSF-Stanford [the two hospitals were, at that time, part of a "UCSF-Stanford" medical services organization] property." App. 118a.

Some employees engaged in solicitation and distribution of literature in violation of all aspects of the rule. They solicited and distributed literature in areas that were undisputedly patient care areas, inside the nursing units as well as outside the nursing units. App. 151a, 153a, 155a, 156a. They distributed literature to patients on hospital premises. App. 80a; A0484-485 (citations to "A0____" refer to the record before the Court of Appeals). Union literature introduced at the hearing described "how our union can help" with alleged problems such as "short staffing or heavy workloads" claimed to be "harmful to the patients all of us have a role in caring for." The literature alleged "we don't always have the training we need to do our new duties or work effectively in units we're not familiar with." It quoted an employee as saying "if something happened to the patients, we don't know CPR. Some of us are not comfortable doing this without more training." A0644.

B. Procedural History

The Union filed unfair labor practice charges with the Board, claiming that the hospitals' policy violated sections 7 and 8(a)(1) of the NLRA. Following a four-day evidentiary hearing, an administrative law judge upheld the policy as applied inside the nursing units, as well as admitting and registration areas, on the ground that these were "immediate patient care" areas. App. 195a. With respect to waiting areas and lounges outside nursing units, however, the ALJ ruled that these were not immediate patient care areas. Thus, according to the ALJ, the policy violated sections 7 and 8(a)(1) because the hospitals failed to demonstrate that solicitation and distribution activities in those areas were likely to interfere with patient care. App. 226a.

With respect to the prohibition against soliciting nonemployees, the ALJ found that the prohibition was overbroad because the hospitals failed to demonstrate a likelihood of patient disturbance that would justify the ban. App. 231a-232a. The ALJ did not consider evidence that the rule left many areas available for solicitation. The Board affirmed the ALJ's decision. App. 28a.

Stanford Hospital and Clinics (the successor to UCSF Stanford Health Care, which had operated the hospitals during the time in question) filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals denied the petition for review with respect to the hospitals' solicitation and distribution policy.

In ruling on the restriction on solicitation in waiting areas outside nursing units, the Court of Appeals restated and relied on the Board's presumption that hospitals may ban solicitation and distribution activities in patient care areas, defined as "patient rooms, operating rooms, and places where patients receive treatment," but that hospitals may not ban solicitation and distribution outside patient care areas unless "necessary to avoid disruption of health-care operations or disturbance of patients." App. 7a. Applying the Board's presumption, the Court of Appeals placed the burden on the hospitals to demonstrate a likelihood of patient disturbance, and concluded that the hospitals had not met this standard. App. 8a.

With respect to the prohibition on solicitation directed at nonemployees, the Court of Appeals ruled that there was no "substantive distinction between solicitation of fellow employees and nonemployees." App. 16a. The Court of Appeals dismissed as dictum this Court's statement in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 n.23 (1978), that "a rule forbidding any distributions to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." App. 19a. The Court of Appeals approved the conclusion of the ALJ that Petitioners had not shown that this activity "had any adverse effect upon patient care." App. 19a. The Court of Appeals, like the Board, did not consider the availability of other areas for solicitations.

REASONS FOR GRANTING THE PETITION

This case presents several critical questions left open in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) and *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), concerning the ability of a hospital to prohibit solicitations by employees that are likely to interfere with patient care.

The first issue is whether a hospital can prevent employees who are on their own time from approaching patients and their families with union-organizing issues and literature. This Court, in *Beth Israel*, assumed that a rule preventing employees from approaching patients and families would be permissible. 437 U.S. at 503 n.23 ("a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients"). Yet, contrary to *Beth Israel*, the Court of Appeals held that a hospital's rule preventing employees from involving patients and their families is unlawful. An employee on a break should not be allowed to undermine the employer's legitimate objectives and alienate customers. This is particularly critical when the employer is an acute care hospital and the "customers" are patients and families.

This case also presents a second critical question, discussed, but expressly left undecided in *Baptist Hospital*: Is it irrational for the Board to presume that "patient care" occurs only in "patient rooms, operating rooms, and places where patients receive treatment," and does not also occur in nearby waiting areas where patients and their families seek refuge from the patient unit, receive medical advice and counseling, ponder decisions, and reflect on information about their condition? For many years, the Board has

presumed that solicitation in patient care areas is likely to disrupt patient care and that solicitation outside these patient care areas will not. The Board has, however, adopted a definition of "patient care" that this Court has strongly questioned (*see Baptist Hospital*, 442 U.S. at 788-90).

The Board has narrowly defined patient care areas as "the patients' rooms, operating rooms, and places where patients receive treatment." *St. John's Hospital & School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977). In *Baptist Hospital* this Court expressed "serious doubt" as to the validity of the Board's definition of "patient care." 442 U.S. at 789. This Court stated "Patients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms and even the corridors where patients are encouraged to walk, or visit with their families." 442 U.S. at 789 n.16. This Court in *Baptist Hospital* ultimately did not rule on the Board's definition but urged the Board to review its definition. This case squarely presents the issue expressly reserved in *Baptist Hospital*—whether it is irrational for the Board to define "patient care" areas as including only areas where direct treatment is administered.

Review of this case would also allow this Court to resolve a third question left undecided in *Beth Israel*: In considering whether a hospital may prohibit union solicitation in an area, should the availability of other areas of the hospital for solicitation and organizational activity be a factor? Dictum in *Beth Israel* suggests that "the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same

facility." 437 U.S. at 505. Nevertheless, the Board and the Court of Appeals ignored the evidence in this case that many other areas of the hospital were available for union solicitation. This Court should clarify that availability of other areas for union solicitation should be a factor in considering whether a hospital may prohibit solicitation in an area.

I.

A HOSPITAL SHOULD BE ALLOWED TO PREVENT ITS EMPLOYEES FROM SOLICITING PATIENTS AND THEIR FAMILIES ON HOSPITAL GROUNDS.

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), this Court assumed that a hospital would be allowed to prohibit its employees from soliciting patients and their families on hospital grounds. *Beth Israel* upheld a Board decision that a hospital could not prohibit union solicitation in a hospital cafeteria, but this Court noted that the Board had "not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided." 437 U.S. at 503.

> For example, a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients. [Beth Israel Hospital], in fact, has such a rule. . . .

Beth Israel, 437 U.S. at 503 n.23.

Nevertheless, the Court of Appeals in this case dismissed the statement in *Beth Israel* as "dicta" (App. 19a). The Court of Appeals ruled that there is no "substantive distinction between solicitation of fellow employees and nonemployees." App. 16a.

The Court of Appeals' sweeping statement might be true in some contexts, such as a strike, where appeals to the public are accepted; however, employee organizing is supposed to be governed by the decisions of employees. In this context, economic pressure on the employer is less protected and can be unlawful. *See* NLRA § 8(b)(4) and § 8(b)(7) (29 U.S.C. § 158(b)(4)(A), (7)) (restricting picketing or appeals for boycotts for organizing purposes). In the organizing context, the District of Columbia Circuit itself has observed:

> A long history of cases manifests a hierarchy among Section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interests of non-employees in organizing an employer's employees being somewhat weaker, and the interest of uninvited workers in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers being weaker still.

United Food and Commercial Workers v. National Labor Relations Board, 74 F.3d 292, 298 (D.C. Cir. 1996).

Similarly, where the employee's activity can undermine the employer's business, the employer's interests can outweigh even the most fundamental Section 7 rights. For example, a no-solicitation rule is presumptively valid

with respect to all selling areas of a retail store, even when employees are off-duty. *May Department Store*, 59 N.L.R.B. 976 (1944). In *Marriott Corporation*, 223 N.L.R.B. 978 (1976) the Board ruled that "restaurants, . . . because of the nature of their business, may prohibit solicitation, even during break and lunch periods, in areas where customers are likely to be present." *See Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262, 1264 (1948) (Employees could be prohibited from soliciting in store's selling area, and in restaurant where employees and customers eat because "union solicitation in the restaurants is apt to disrupt the respondent's business."), *quoted with approval*, *Beth Israel Hospital*, 437 U.S. at 503 n.21.

The Court of Appeals approved the ALJ's conclusion that the hospitals had not shown "any adverse effect upon patient care." App. 19a. That is not the correct standard in any setting. No previous case has required a retail store or a restaurant to prove an actual adverse effect on business in order to justify a restriction on even employee-to-employee solicitation. Presumably, a retail store could prevent its employees from using their break times to argue to customers that the store's merchandise is shoddy and overpriced. *A fortiori*, a hospital should not be required to show an actual adverse effect on patients where employees are approaching patients with leaflets that assert a supposed lack of training or lack of competence in life-saving procedures; what matters is only that it "is apt to disrupt patient care." More than any other workplace, hospitals, "carry on a public function of the utmost seriousness and importance" and "give rise to unique considerations." *Baptist Hospital*, 442 U.S. at 790, *quoting Beth Israel*, 437 U.S. at 508.

II.

THIS COURT SHOULD RESOLVE THE QUESTION LEFT UNDECIDED IN *NLRB v. BAPTIST HOSPITAL*, 442 U.S. 773 (1979): WHETHER IT IS IRRATIONAL FOR THE NLRB TO PRESUME THAT PATIENT CARE OCCURS ONLY IN "PATIENT ROOMS, OPERATING ROOMS, AND PLACES WHERE PATIENTS RECEIVE TREATMENT," AND NOT IN NEARBY WAITING AREAS WHERE PATIENTS AND THEIR FAMILIES RECEIVE MEDICAL ADVICE AND COUNSELING.

For many years, the Board has presumed that solicitation in patient care areas disrupts care and may be prohibited. The Board has defined patient care areas as "the patients' rooms, operating rooms, and places where patients receive treatment." *St. John's Hospital & School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977). In this case, the Court of Appeals restated and relied on that presumption:

> Under *St. John's*, hospitals may ban solicitation and distribution activities even during nonwork time in "patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment" because "[s]olicitation at any time in those areas might be unsettling to the patients." Outside patient care areas, however, "a hospital may ban solicitation and distribution only as necessary to avoid disruption of health-care operations or disturbance of patients."

App. 7a (citations omitted), *quoting Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

This Court, however, has never adopted the Board's definition of "patient care"; indeed, this Court initially envisioned a broader definition, stating in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) that, "The main function of the hospital is patient care and therapy and those functions are largely performed in areas such as operation rooms, patients' rooms, and patients' lounges." 437 U.S. at 506.

In *Baptist Hospital*, this Court approved in concept the Board's presumption that no-solicitation rules are valid in "immediate patient care" areas but are invalid elsewhere. However, this Court underscored its doubts about the Board's definition of "patient care." Noting that "the scope of the Board's presumption depends upon the definition of the phrase 'immediate patient-care areas'" (442 U.S. at 779), this Court expressed "serious doubts as to whether the Board's interpretation of its present presumptions adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital." 442 U.S. at 789. This Court noted:

> The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings—receiving rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the corridors, where patients often are encouraged to walk or to visit their families.

442 U.S. at 789 n.16. This case squarely presents the issue expressly reserved in *Baptist Hospital*—whether the Board's definition of patient care is irrational.

That presumption is, in fact, irrational. Like most hospitals, the two hospitals here view "patient care" as more than performing surgery, diagnostic testing or administering medication—patient care includes appropriate concern and support for patients and their families while they are pondering treatment options, waiting for treatment, or waiting for results of tests or examinations. Communicating test results, giving medical advice, and counseling patients and their families are all part of patient care. Sometimes patients and their families must be given time and space to reflect on unfavorable news or take respite. It is irrational to say that meeting these needs is something other than "patient care." Hospitals must be able to establish reasonable rules to protect patients and their families in patient care areas broadly defined to include waiting areas where patients and their families often receive medical advice and counseling.

The proper definition of "patient care" is the decisive point in this case. While the Court of Appeals made factual observations in support of its conclusion that the no-solicitation rule was not appropriate in the waiting areas outside the nursing units, each of those factual statements applies equally or more strongly to the sitting areas inside the nursing unit, which were determined to be in "patient care" areas.

The Court of Appeals noted that the hospitals had not "barred employees from the waiting areas outside the units . . . nor prohibited employees from eating or sleep in lounges or waiting rooms." App. 9a. The evidence showed that the hospitals allowed employees to take breaks and eat in the "day rooms" inside the nursing units (where the no-solicitation rule was upheld) and that this was a routine occurrence. With respect to some of the waiting areas outside

the units, there was testimony asserting that employees had been seen eating or sleeping in the lounges, but no indication that this was routine or that anyone in management knew of this activity, except for one employee appreciation lunch.

The Court of Appeals also noted the evidence that the hospitals had given employees materials opposing the Union with their paychecks. There was no indication that any such distribution by management had occurred in a no-solicitation area, but the ALJ concluded that the hospitals had not provided specific rules limiting where paychecks would be distributed. One witness testified she saw such material on the desk at her nurse's station. One such flyer was taped to a cupboard at the back of a nursing unit and one was taped to a wall inside a laboratory area where it could be seen by a patient at the window counter. The incidents of leaving the flyer on a desk and taping the flyers up were not attributed to management. The Court of Appeals combined these facts into the assertion that "Stanford itself posted anti-union materials discussing the possibility of strikes 'without limiting the areas of . . . distribution.'" App. 9a [Internal quotes and ellipses in original]. That may not be a fair summary of the facts, but, more importantly, all the incidents occurred in areas which the ALJ concluded were patient care areas despite these facts.

The Court of Appeals found it inexplicable that the hospitals did not bar all activities likely to disturb patients. The Court of Appeals noted that waiting areas were not necessarily used by patients and families at all times, particularly at night, and that there were no complaints about union solicitation. These observations are also equally applicable to sitting rooms, whether inside or outside the nursing units. Thus, the factual assertions noted by the Court of Appeals are not sufficient to overcome the presumption that there should not be solicitations in "patient care" areas.

The key question is thus whether the Board is applying a rational definition of "patient care." Nearly 25 years after first identifying this important issue in *Baptist Hospital*, this Court should resolve this important issue now.

III.

THIS COURT SHOULD ALSO RESOLVE A QUESTION LEFT UNDECIDED IN *BETH ISRAEL HOSPITAL v. NLRB*, 437 U.S. 483 (1978): IN CONSIDERING WHETHER A HOSPITAL MAY PROHIBIT UNION SOLICITATION IN AN AREA, SHOULD THE AVAILABILITY OF OTHER AREAS OF THE HOSPITAL FOR SOLICITATION AND ORGANIZATIONAL ACTIVITY BE A FACTOR?

Recognizing "the importance of the employer's interest in protecting patients from disturbance," this Court suggested in *Beth Israel* that in considering whether a hospital may prohibit union solicitation in an area, the availability of other areas of the hospital for solicitation should be a factor:

> While outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry, it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the

> permissibility of restrictions in other areas of the same facility.

Beth Israel, 437 U.S. at 505. Ultimately, however, this Court found that factor inapposite in *Beth Israel* because the alternative areas for organizational activity were not suitable. 437 U.S. at 505.

Here, the evidence showed that other areas of the hospital were available and suitable for union solicitation. Cafeterias, employee break rooms, outside areas, and numerous hallways (away from patient areas) were available for employee-to-employee union solicitation and organizational activities. App. 121a. Nevertheless the Board and the Court of Appeals ignored this evidence. In ignoring the availability of other areas, the Court of Appeals failed to properly balance the hospital's legitimate interests against any minimal burden on employees' rights. *See St. John's Hospital & School of Nursing, Inc. v. NLRB*, 557 F.2d 1368, 1374-75 (10th Cir. 1977) ("An additional factor to be considered in striking the proper balance between the rights of the employees, the Hospital, and the patients is the availability of other areas in which union activities are permitted").

This Court should clarify this important issue left undecided in *Beth Israel*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED APRIL 18, 2003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1454

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

INTERVENOR

Argued January 21, 2003 Decided April 18, 2003

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Before: GINSBURG, *Chief Judge*, and ROGERS and TATEL, *Circuit Judges*.

Appendix A

TATEL, *Circuit Judge*: Petitioner, a hospital, adopted a policy prohibiting its employees from, among other things, soliciting and distributing materials to (1) fellow employees in areas adjacent to patient units and (2) all nonemployees throughout the hospital. Finding that Petitioner failed to demonstrate that such activities were likely to disturb patients, the National Labor Relations Board concluded that the policy was overbroad in violation of the National Labor Relations Act. The Board also found that Petitioner committed an unfair labor practice when it discriminatorily evicted a nonemployee union organizer from its premises. Finding the Board's decision regarding the solicitation and distribution policy consistent with Board precedent and supported by substantial evidence, we deny the petition for review and grant the Board's cross-application for enforcement. Because the Board's eviction decision is contrary to law, however, we grant the petition with respect to that issue and deny the Board's cross-application.

I.

In 1997, the Stanford University Medical School and the University of California at San Francisco merged certain of their medical facilities into a new entity known as UCSF-Stanford Health Care (USHC). The events at issue in this case occurred on the USHC South facility, located on Stanford's Palo Alto, California campus. Employing some 7,000 persons, including approximately 1,400 service employees, the facility consists of two hospitals: the 663-bed Stanford Hospital Center and the 162-bed Lucile Packard Children's Hospital.

Appendix A

In late November 1997, following consummation of the USHC merger, Intervenor Service Employees International Union, Local 715 began a drive to organize the hospital's service and maintenance employees. During the campaign, which culminated in a majority vote in favor of representation, hospital employees and full-time union organizers regularly solicited employees and nonemployees both inside and outside the hospital and distributed union literature to them.

Responding to the union's solicitation activities, USHC promulgated an employee solicitation and distribution policy intended to "avoid disrupting patient care and to prevent disturbing our patients and their families." *UCSF Stanford Health Care & Serv. Employees Int'l Union, Local 715*, 335 N.L.R.B. No. 42, at 23 (Aug. 27, 2001). The policy prohibited (1) solicitation of employees on hospital premises during work time and in "patient care areas at any time"; (2) literature distribution on hospital premises during work time, and in work areas at any time; and (3) solicitation of nonemployees or distribution of literature to them at all times throughout the entire facility. *Id.*

The policy defined patient care areas as including "patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and their families or visitors, and the hallways immediately adjacent to all such areas." *Id.* This definition of patient care areas includes what the parties refer to as "patient units." Reached in each facility by walking down a hallway and passing through a set of double doors, patient units contain: patient rooms; treatment rooms for

radiology, surgery, and other medical purposes; and lounges or sitting areas for use by patients, families, and visitors. Areas outside patient units but covered by the patient care area definition include a separate set of lounges and waiting areas that patients, families, and visitors also use.

In unfair labor practice charges filed with the Board, the union claimed that the solicitation and distribution policy violated sections 7 and 8(a)(1) of the National Labor Relations Act. 29 U.S.C. §§ 157, 158(a)(1). Following a two-day evidentiary hearing, an administrative law judge upheld the policy as applied to patient units, admitting and registration areas, and day rooms used by employees. *UCSF Stanford Health Care*, 335 N.L.R.B. No. 42, at 41. With respect to hallways and lounges outside patient units, however, the ALJ found that because USHC had failed to demonstrate that solicitation and distribution activities in those areas were likely to disturb patients, the policy was overbroad in violation of NLRA sections 7 and 8(a)(1). *Id.* at 46-49. According to the ALJ, the prohibition against soliciting nonemployees and distributing materials to them was also overbroad because USHC had failed to demonstrate "special circumstances," such as a likelihood of patient disturbance, that would justify the ban. *Id.* at 49-50. Finally, the ALJ found that USHC violated NLRA section 8(a)(1) when, during the organizing campaign, it evicted several nonemployee union organizers from the hospital's premises, including one Bruce Harland, whose eviction is at issue in this case. *Id.* at 38. The Board affirmed. *Id.* at 1.

Stanford Hospital and Clinics, the successor to USHC (the merger was dissolved in April 2000) now petitions for

review, challenging the Board's conclusion that its solicitation and distribution policy and its eviction of Harland violated the NLRA. The Board cross-applies for enforcement. Because Stanford does not challenge the Board's finding that it violated NLRA section 8(a)(1) by excluding and attempting to exclude full-time union organizers other than Harland, we grant the Board's petition to enforce that portion of its order. *See Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992) (unchallenged Board findings are entitled to summary enforcement).

II.

In reviewing Stanford's challenges, we "give considerable deference to the Board's interpretation of the NLRA, and must accept the Board's determinations if they are supported by substantial evidence." *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 588 (D.C. Cir. 1996). Decisions regarding witness credibility and demeanor " 'are entitled to great deference, as long as relevant factors are considered and the resolutions are explained.' " *Breakfast Prods., Inc. v. NLRB*, 901 F.2d 1130, 1130 (D.C. Cir. 1990) (unpublished disposition) (quoting *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987)). With this highly deferential standard of review in mind, we consider each of Stanford's challenges.

Solicitation and Distribution Activities Directed at Fellow Employees in Non-Patient-Care Areas

NLRA section 7 guarantees employees "the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." 29 U.S.C. § 158(a)(1). The Supreme Court has repeatedly recognized that the right of employees under section 7 "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Employees' right to "self-organization at the jobsite," however, is not unlimited, conflicting as it does with employers' property rights and managerial interests. Thus, because "the undisputed right of self-organization assured to employees under the . . . Act and the equally undisputed right of employers to maintain discipline in their establishments . . . are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee," the Board must "work[ ] out an adjustment" between these competing rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945). "Accommodation between [employee-organization rights and employer property rights]," the Court later explained, "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

The Supreme Court has allowed the Board to implement these section 7 prescriptions by adopting a series of presumptions regarding restrictions on solicitation and distribution activities. *Republic Aviation Corp.*, 324 U.S. 793, 804-05 (explaining

that Board presumption is like "a statutory presumption or one established by regulation"). For example, "restrictions on employee solicitation during nonworking time, and on distribution during nonworking time in nonworking areas, are violative of § 8(a)(1) unless the employer justifies them by a showing of special circumstances which make the rule necessary to maintain production or discipline." *Beth Israel Hosp.*, 437 U.S. at 492-93. Alternatively, an employer's nondiscriminatory ban on nonemployee union organizers' access to the employer's property for the purpose of solicitation and distribution is presumptively lawful unless the union demonstrates that employees are not otherwise accessible to union organizers. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

In *St. John's Hospital & School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), the Board adopted special presumptions regarding solicitation and distribution activities in hospitals. Because "the primary function of a hospital is patient care and [because] a tranquil atmosphere is essential to the carrying out of that function," the Board allows hospitals to "impose somewhat more stringent prohibitions on solicitation than are generally permitted." *Id.* at 1150. Under *St. John's*, hospitals may ban solicitation and distribution activities even during nonwork time in "patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment" because "solicitation at any time in those areas might be unsettling to the patients." *Id.* Outside patient care areas, however, "a hospital may ban solicitation and distribution only as necessary to avoid disruption of health-care operations or disturbance of patients." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C.

Cir. 2002) (internal quotation marks and citation omitted). The Supreme Court has repeatedly upheld these solicitation and distribution rules. *See Beth Israel Hosp.*, 437 U.S. 483; *Baptist Hosp. v. NLRB*, 442 U.S. 773 (1979).

In this case, the sole issue before us is whether Stanford may, in order to protect patients from disturbance, prohibit solicitation and distribution activities in hallways and lounges outside patient units. According to Stanford's four witnesses, patients and their families frequent these areas and are disturbed by non-patient-care-related activities, including employee solicitation and distribution activities directed at fellow employees. Although Stanford need demonstrate only "a likelihood of, not actual, . . . [patient] disturbance," we conclude, as we did in *Brockton Hospital* (which involved a similar policy) that "substantial evidence supports the Board's decision that the Hospital did not meet even this standard." 294 F.3d at 104. In reaching this conclusion, we rely on three particularly persuasive elements of the ALJ's analysis.

First, the ALJ doubted the credibility of Stanford's witnesses because, although they testified that *all* non-patient-care-related activities—such as eating, sleeping, and conversations on controversial subjects in lounges and waiting areas—disturb patients, they were unable to explain why Stanford restricted only solicitation or distribution, and not all other non-patient-care-related activities. "These witnesses," the ALJ explained, "did not differentiate the actions of [Stanford's] employees during solicitation and distribution activities and their allowable conversations and distributions, even if they involved controversial subjects."

UCSF Stanford Health Care, 335 N.L.R.B. No. 42, at 46. Given the breadth of the witnesses' claims, the ALJ was troubled that Stanford had neither "ban[ned] employees from the waiting areas outside the units, the registration area or the hallways" nor prohibited employees from eating or sleeping in lounges or waiting rooms. *Id.* Perhaps most tellingly, the ALJ found that Stanford itself posted anti-union materials discussing the possibility of strikes "without limiting the areas of . . . distribution." *Id.*

The Supreme Court's *Beth Israel Hospital* decision supports the ALJ's reasoning. Upholding a Board invalidation of a ban on solicitation in an employee cafeteria, the Court observed that the hospital's differential treatment of (1) solicitation activities and (2) other activities equally likely to disturb patients undercuts the hospital's justification for the ban. "Evidence that petitioner adopted a less restrictive approach to behavior in the cafeteria which would be at least as disquieting to patients as union solicitation," the Court explained, "further supports the Board's conclusion that the risk of harm to patients is not so great as to justify an unlimited restriction." *Beth Israel Hosp.*, 437 U.S. at 502 n.20.

Stanford insists that there is a recognized distinction between union solicitation and distribution on the one hand and mere conversation on the other, and that Stanford should not be forced to ban the latter in order to regulate the former. Although it is certainly true that "solicitation has a disruptive force quite apart from its contribution to noise level and overcrowding," *Baylor Univ. Med. Ctr. v. NLRB*, 578 F.2d 351, 356 (D.C. Cir. 1978), Stanford's argument misses the point. Neither the ALJ nor the Board held that Stanford

could ban solicitation and distribution activities in non-patient-care areas only if it also banned all non-patient-care-related activities and conversations. Indeed, the Board has never required the adoption of such sweeping bans as a condition for approving limitations on solicitation and distribution activities. Rather, the ALJ's decision rests on the tension between Stanford's witnesses' testimony that "any activity that does not appear to focus on patient care is upsetting to families" and the hospital's failure to "include all such behavior [in] its ban." *UCSF Stanford Health Care*, 335 N.L.R.B. No. 42, at 46. "This failure," the ALJ concluded, "was unexplained[,] and the basis for its selectivity not presented and therefore unjustified." *Id.*

Second, the ALJ found that Stanford failed to produce "specific evidence" demonstrating that "all . . . [patient] waiting areas were used by patients or their families." *Id.* "Assuming some use by patients and their families of some of these rooms," the ALJ explained, "the frequency of such use or the relation to immediate patient care was not clearly established by [Stanford]." *Id.* Indeed, Stanford provided no evidence of patients using the rooms either "after 8 p.m. when visiting hours ended at Stanford Hospital" or late in the evening at Lucile Packard when patients and family members were unlikely to be present. *Id.* at 46-48. Nor did Stanford "present[ ] any evidence concerning the frequency of patients using hallways and waiting areas outside the units to walk as part of their recovery regimen or otherwise." *Id.* at 47.

Our decision in *Brockton Hospital* supports the ALJ's analysis. There, we sustained the Board's invalidation of a ban on distribution activities in a hospital's vestibule because

the hospital had failed to produce evidence that patients were likely to observe the activity. "The Hospital's experts testified that if patients saw or heard about the content of the literature they would be upset; the Hospital presented no reason, however, to believe patients were likely to learn of the content of the literature." *Brockton Hosp.*, 294 F.3d at 104 (internal citation omitted). To be sure, unlike in *Brockton Hospital*, the record here contains some evidence that doctors spoke to patients in waiting areas and that patients used some waiting areas and hallways outside patient units. But *St. John's* requires more than mere patient presence in areas covered by a solicitation and distribution ban. In order to satisfy the *St. John's* patient-disturbance test, hospitals must establish both that patients will witness employee solicitation and that they will likely be disturbed by it. Here, not only has Stanford failed to demonstrate the frequency with which patients use hallways and waiting areas outside patient units, or that they even use these areas, but the ALJ doubted the credibility of Stanford's claim that employee solicitation and distribution activities would disturb patients. *See supra* pp. 7-8.

Stanford argues that the ALJ effectively required it to demonstrate patient use of each hallway and lounge twenty-four hours a day, seven days a week. This is true, but that obligation stems from Stanford's decision to make its policy applicable in non-patient-care areas twenty-four hours a day, seven days a week. If Stanford wished to escape that burden, it could have done so by adopting a less comprehensive ban on solicitation and distribution activities. For example, it could have limited its policy to the periods of time during the day when patients and their visitors were most likely to

be in hallways and lounges outside patient units. But having made its policy effective twenty-four hours a day, seven days a week, Stanford had an obligation to demonstrate "that solicitation is likely either to disrupt patient care *or* disturb patients." *Baptist Hosp.*, 442 U.S. at 782 n.11. In *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (4th Cir. 1990), the Fourth Circuit reached a similar result, upholding the Board's invalidation of a ban on distribution activities at a hospital entrance because the hospital had failed to demonstrate that patients used the entrance early in the morning when leafletting occurred. *Id.* at 935.

Third, the ALJ found that USHC failed to produce "evidence of any complaints generated by its employees[']solicitation and distribution activities." *UCSF Stanford Health Care*, 335 N.L.R.B. No. 42, at 48. The ALJ reached this conclusion based on record evidence that during the eleven months in which employees engaged in solicitation and distribution activities, USHC received some 1,200 complaints about Stanford Hospital and 300 about Lucile Packard, but "few if any" involved union solicitation or distribution. Although Stanford must show only a likelihood of patient disturbance—not actual patient disturbance—the Supreme Court found in *Beth Israel Hospital* that the absence of complaints during eight months of union activity, a period three months shorter than the union activity at USHC, was "especially telling." *Beth Israel Hosp.*, 437 U.S. at 502; *see also Brockton Hosp.*, 294 F.3d at 104 (absence of complaints undermines hospital's argument that permitting union activity would create a likelihood of disturbance).

Together, these three aspects of the ALJ's decision—her doubts about witness credibility, her finding that Stanford failed to show patient use of all hallways and lounges outside patient units, and her finding that few if any complaints received by the hospital during the organizing campaign involved solicitation and distribution activities—are more than sufficient to support the Board's conclusion that Stanford failed to demonstrate that solicitation and distribution activities directed at fellow employees outside patient units were likely to disturb patients. Stanford insists, however, that its evidence is "consistent with evidence already deemed by this court and the Supreme Court sufficient as a matter of law." Petitioner's Br. at 36. In support of this proposition, Stanford cites *Baptist Hospital* and our first and third *Baylor University Medical Center* decisions, but it ignores significant differences between those cases and this one.

In *Baptist Hospital*, the Supreme Court denied enforcement of a Board decision invalidating a solicitation ban that applied to corridors and sitting rooms on patient floors. Stanford calls our attention to the following statement in the Court's opinion:

> The increased emphasis in modern hospitals on the mobility of patients as an important aspect of patient therapy is well known, and appears to be a part of patient care at the Hospital. Small public rooms or sitting areas on the patient-care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families—often during times of crisis.

Baptist Hosp., 442 U.S. at 784 (internal citations omitted). We do not read this statement, as Stanford does, to apply to all hospitals without regard to the specific evidence before the Board. The record in *Baptist Hospital* contained evidence that patients actually used waiting areas outside immediate patient care areas. And as the Supreme Court pointed out in a sentence not quoted by Stanford, the record also contained evidence that "patients in the most critical and fragile conditions often move or are moved through these corridors, either en route to treatment in some other part of the Hospital or as part of their convalescence." *Id.* By contrast, the ALJ here found that Stanford failed to demonstrate the extent to which patients use hallways and waiting areas covered by its policy. *Baptist Hospital* differs from this case in a second important respect: Whereas the ALJ in this case doubted the credibility of Stanford's claim that employee solicitation and distribution actually would disturb patients, in *Baptist Hospital* the Court observed—in a sentence only partially quoted by Stanford—that "nothing in the evidence before the Board provided any basis . . . for doubting the accuracy of the [witnesses'] statements . . . that union solicitation in the presence or within the hearing of patients may have adverse effects on their recovery." *Id.*

Our *Baylor University* decisions are equally unhelpful to Stanford. In the first decision, we upheld a solicitation and distribution ban that applied to a hospital corridor. *Baylor Univ. Med. Ctr. v. NLRB*, 578 F.2d 351 (D.C. Cir. 1978). But there, unlike here, the hospital had presented significant evidence about the congested state of its corridors. Witnesses testified:

> [S]ome 15,000-20,000 persons entered the hospital each day and that the passageways and corridors were "as crowded as the main streets of downtown Dallas." It is remarkable that conditions at Baylor are not more chaotic than they are; certainly the imposition of any additional sources of potential disruption should only be required reluctantly and after a far more detailed analysis than the NLRB devoted to this particular case.

Id. at 355. Contrary to Stanford's claim, our third *Baylor University* decision, which declined to enforce a Board order invalidating a partial ban on solicitation and distribution activities in a hospital cafeteria, did not rest on "physician testimony regarding the psychological vulnerability of inpatients (and family members) in acute care hospitals, and the importance for inpatients to feel that hospital staff 'really cares totally for their well being.' " Petitioner's Br. at 32 (quoting *Baylor Univ. Med. Ctr. v. NLRB*, 662 F.2d 56, 62 n.8 (D.C. Cir. 1981)). Rather, it rested on the Board's disregard of "the testimony of several witnesses who testified that solicitation in the cafeteria would disrupt patients and visitors." *Id.* Stanford presented no such evidence.

Solicitation and Distribution Activities Directed at Nonemployees

The Board found the ban on solicitation of nonemployees anywhere on Stanford's property to be overbroad because Stanford had failed to demonstrate that the ban was needed to protect patients. Challenging this conclusion, Stanford argues that employees have no right to solicit nonemployees

and distribute union materials to them, and that even if they do, this right is outweighed by Stanford's right to provide a suitable environment for its patients. Our resolution of this issue is controlled by *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), in which the Supreme Court explained that when an employer is charged with interfering with section 7 activity by prohibiting employees from engaging in union activity on its property, two questions arise:

> The first is whether, apart from the location of the activity, [the restricted activity] is the kind of concerted activity that is protected from employer interference by §§ 7 and 8(a)(1) of the National Labor Relations Act. If it is, then the second question is whether the fact that the activity takes place on [the employer's] property gives rise to a countervailing interest that outweighs the exercise of § 7 rights in that location.

Id. at 563.

As to the first *Eastex* question, not only does section 7 protect employee rights to solicit fellow employees and to distribute materials to them, *see supra* pp. 5-7, but neither this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and nonemployees. To the contrary, both we and the Board have made clear that NLRA sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees. For example, in *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993), we held that employees are entitled to "distribute leaflets to customers" on their employer's

property, *id.* at 1177, and in *Santa Fe Hotel & Casino*, 331 N.L.R.B. 723 (2000), the Board affirmed an ALJ decision stating that "the fact that the off-duty employee distributions . . . were to customers rather than to other employees appears to be a distinction without a difference and is an irrelevant consideration," *id.* at *730. *See also NCR Corp.*, 313 N.L.R.B. 574, 576 (1993) ("The right of employees to distribute union literature during nonworktime and nonwork areas is not limited only to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations."); *cf. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 63 (1964) (holding that NLRA section 8(b)(4)(ii)(B) does not prohibit "peaceful picketing . . . limited . . . to persuading Safeway customers not to buy Washington State apples when they traded in Safeway stores").

Stanford insists that "[t]he Supreme Court has long recognized . . . a clear distinction in the strength of the section 7 rights implicated by communication purely among employees, and communication between nonemployees and employees." Petitioner's Reply Br. at 22. This proposition, Stanford claims, "follows logically" from *Lechmere*, which holds that nonemployee union organizers otherwise able to communicate with employees can be excluded from an employer's property. Stanford misreads *Lechmere*. Having nothing to do with whether employees may solicit nonemployees, that decision turns on the fact that the NLRA's plain language "confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S.

at 532 (emphasis in original). What matters under *Lechmere* is not the identity of a solicitor's intended audience (nonemployees in this case), but whether the solicitor is employed by the property owner or otherwise lawfully on the employer's property. Nothing in *Lechmere* supports Stanford's contention that employees have no right to solicit and distribute to nonemployees.

Because section 7 entitles employees to solicit nonemployees, the validity of Stanford's policy turns on the second *Eastex* question: Does the fact that the solicitation and distribution activities took place on the employer's property give rise to countervailing employer interests that outweigh employee section 7 rights? Echoing its justification for banning solicitation and distribution activities outside patient units, Stanford argues that its employees' right to solicit nonemployees is outweighed by the need to "respect . . . the privacy and sensitivity of patients." Petitioner's Br. at 16. For essentially the same reasons we have sustained the Board's conclusion that Stanford failed to establish a likelihood of patient disturbance that could justify its more limited ban on solicitation of fellow employees, we agree with the Board that Stanford failed to demonstrate that its interest in patient privacy and well-being outweighs its employees' section 7 rights to solicit nonemployees. The ALJ explained:

> The rule [banning all solicitation of nonemployees and distribution to them] is so broad as to encompass all lawful employee[s'] petitioning of public support regardless of where such solicitation or distribution occurs on [Stanford's]

> property. . . . The ban clearly bars protected activity throughout the hospitals and other areas defined only as [Stanford's] property, without establishing a special need for such a broad ban. There was no showing patients would receive such literature outside the hospital buildings or in the cafeterias, gift shops, maintenance or utility areas. Employees, absent a showing of special circumstances, are not barred from standing in front of hospitals and handing out literature concerning a labor issue. [Stanford] has failed to demonstrate the existence of special circumstances in this case.

UCSF Stanford Health Care, 335 N.L.R.B. No. 42, at 50. The ALJ also observed that Stanford presented no persuasive evidence that "such a broad ban is necessary to protect patients," nor that "regular leafletting by the Union outside the Hospital during the organizing campaign prior to the ban . . . had any adverse effect upon patient care." *Id.*

Contesting none of these findings, Stanford maintains that even if section 7 allows solicitation of nonemployees, employees may not exercise such rights in hospitals. In support, Stanford first cites *Beth Israel Hospital*'s statement that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." *Beth Israel Hosp.*, 437 U.S. at 503 n.23. This statement, however, is dicta, for the question before the *Beth Israel Hospital* Court had nothing whatsoever to do with employer authority to restrict solicitation of nonemployees. Equally important, nothing in

Beth Israel Hospital suggests that the Court intended to sanction hospital rules that prohibit solicitation and distribution activities unlikely to affect patients or patient care. Quite to the contrary, the Court *sustained* the Board's *St. John's* presumption under which employers seeking to limit solicitation and distribution activities must demonstrate a likelihood of patient disturbance.

Stanford also cites *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), which held that a small medical practice may lawfully prohibit its employees from discussing (1) confidential patient medical information with third parties and (2) grievances within earshot of patients. That decision hardly supports Stanford's claim that it may prohibit its employees from discussing their own terms and conditions of employment with nonemployees. Moreover, in upholding the policy at issue in that case, we relied on the existence of two considerations not present here: that the employer "does not operate large facilities where the distinction between patient and non-patient areas can easily be discerned," and that, "in a small medical practice[,] . . . the employer has unique concerns about employees acting in a way that might disturb patients." *Id.* at 213. As Stanford concedes, it has hundreds of beds and thousands of employees.

Finally, Stanford relies on *Rocky Mountain Hospital*, 289 N.L.R.B. 1347 (1988), in which the Board adopted an ALJ decision upholding a complete ban on solicitation of nonemployees. According to Stanford, the Board's failure to explain why Stanford's policy differs from the one sustained in *Rocky Mountain Hospital* renders the decision here

arbitrary and capricious. The Board responds that *Rocky Mountain Hospital* has no precedential value because no one excepted to the ALJ's decision sustaining the solicitation ban. We agree with the Board.

As the Board has explained, it has a "well-established practice of . . . adopting an administrative law judge's findings to which no exceptions are filed. Findings adopted under such circumstances are not . . . considered precedent for any other case." *Colgate-Palmolive Co.*, 323 N.L.R.B. 515, 515 (1997). Nothing in *International Union of Operating Engineers, Local 12*, 270 N.L.R.B. 1172 (1984), is to the contrary. The issue in that case was whether an ALJ's finding of an NLRA violation, adopted by the Board without the union having filed an exception, could support an enhanced penalty for a later violation by the *same* union. In keeping with its position here, the Board concluded that "while the lack of formal review may diminish or even negate the precedential value of the rationale in such a decision, there is no sound basis for treating [it] as less than a formal determination of a respondent's culpability under the Act." *Id.* at 1172-73. Therefore, although it would have been preferable for the Board to say something about *Rocky Mountain Hospital*, its failure to do so renders its decision neither arbitrary nor capricious.

Eviction of Harland

This brings us finally to Stanford's challenge to the Board's conclusion that the eviction of union organizer Harland violated NLRA section 8(a)(1). The facts are these: Sometime in September 1998, while Harland was sitting

on a bench waiting for a ride from a hospital employee, a Stanford guard directed him to leave the premises. The guard recognized Harland both from earlier conversations and from having previously kicked him out of the cafeteria and other parts of the hospital for violating Stanford's solicitation and distribution policy. Although Harland insisted that he was merely waiting for a ride, like others standing nearby, the guard escorted him off the premises, telling him never to return.

The ALJ found that Harland's eviction constituted discrimination on the basis of protected activity because Stanford had not evicted persons unaffiliated with the union who were also waiting for rides. Although the ALJ found that the eviction also violated California law, the Board, in affirming the ALJ, relied "solely on the judge's conclusion that the eviction discriminated against Harland based on protected activity." *UCSF Stanford Health Care*, 335 N.L.R.B. No. 42, at 1.

Stanford argues that the Board should have compared Harland to persons who were not only waiting for rides on hospital property, but who, like Harland, had also been previously asked to leave the hospital for violating its solicitation and distribution policy. According to Stanford, because neither the ALJ nor the Board found that it treated Harland any differently from others who had violated the solicitation and distribution policy, the eviction of Harland cannot constitute discrimination in violation of section 8(a)(1). We agree.

Appendix A

As a nonemployee union organizer—in contrast to a Stanford employee—Harland had no section 7 right of access to Stanford's property. *See Lechmere*, 502 U.S. at 532 (explaining that nonemployee union organizers are not directly protected by the NLRA). The rule that nonemployee organizers have no right of access to employers' property has two recognized exceptions. First, nonemployee union organizers are entitled to access where "the location of a plant and the living quarters of the employees places the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* at 533-34 (internal quotation marks and citation omitted). Second, "an employer engages in discrimination as defined by section 8(a)(1) if it denies union access to its premises while allowing similar distribution or solicitation by nonemployee entities other than the union." *Lucile Salter Packard Children's Hosp.*, 97 F.3d at 587. As *Lucile Packard* demonstrates, however, this latter exception—the one at issue in this case—requires differential treatment of nonemployee organizers and similarly situated solicitors and distributors. Absent evidence of differential treatment of union and nonunion solicitors, there can be no finding of discrimination.

Here, the Board violated this basic principle. It compared Harland, a self-confessed serial violator of Stanford's solicitation and distribution rules, to non-soliciting bench sitters. It should have compared Harland to other bench sitters who had previously violated Stanford's solicitation policy.

Appendix A

III.

Having considered Stanford's remaining arguments and found them to be without merit, we deny the petition with respect to the solicitation and distribution policy and grant the Board's cross-application for enforcement. With respect to Harland's eviction, we grant Stanford's petition and deny the Board's cross-application for enforcement.

So ordered.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED AUGUST 27, 2001

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

Cases 32-CA-16965 and 32-CA-17092

UCSF Stanford Health Care

and

Service Employees International Union, Local 715,
AFL-CIO

August 27, 2001

DECISION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On December 26, 2000, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The Charging Party filed an answering brief, cross-exceptions, and a supporting brief. The Respondent filed a consolidated answering brief and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Appendix B

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order[2] as modified.

In adopting the conclusion that the evictions of non-employee union handbillers from certain areas outside the Respondent's facility violated Section 8(a)(1), we rely solely on the judge's finding that the Respondent failed to make a threshold showing of any property interest entitling it to exclude individuals from those areas. We do not rely, however, on *Hader v. Co-Play Cement Mfg. Co.*, 410 Pa. 139, 189 A.2d 271 (1963). We find it unnecessary to pass on the alternative theories of violation addressed by the judge.

In adopting the conclusion that the Respondent violated Section 8(a)(1) by evicting Union organizer Harland from an outdoor bench within its leasehold, we rely solely on the

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1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

2. We have modified the proposed Order to conform with the Conclusions of Law.

judge's conclusion that the eviction discriminated against Harland based on protected activity. We find it unnecessary to pass on the alternative theories addressed by the judge. Furthermore, we do not rely on *Nick's*, 326 NLRB 997, 1000 (1998), enf. granted in part and denied in par, 222 F.3d 1030 (D.C. Cir. 2000), vacated and reversed in part 332 NLRB No. 156 (2000).

We adopt the judge's finding that the Respondent further violated Section 8(a)(1) by promulgating, maintaining, and distributing an employee no-solicitation/no-distribution rule that was overlybroad on its face, because the Respondent did not demonstrate the rule was necessary to avoid disruption of health care operations or disturbance of patients with respect to areas which were not immediate patient care areas. See *Beth Israel Hospital, Inc. v. NLRB*, 442 U.S. 773 (1979); *NLRB v. Baptist Hospital, Inc.*, 437 U.S. 483 (1978); and *Brockton Hospital*, 333 NLRB No. 165 (2001).

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, UCSF Stanford Health Care, Palo Alto, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b), and reletter the subsequent paragraph.

> "(a) Promulgating, maintaining, and distributing overlybroad no-solicitation/ no-distribution rules.
>
> "(b) Evicting, attempting to evict, or threatening to evict union organizers from areas for which the Respondent has no property interest permitting it to evict individuals.
>
> "(c) Discriminatorily excluding union organizers from areas within its leasehold where nonunion individuals engaged in the same activity are permitted."

2. Substitute the attached notice for that of the administrative law judge.

Appendix B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate, maintain, or distribute overlybroad no-solicitation or no-distribution rules.

WE WILL NOT evict, attempt to evict. or threaten to evict union organizers from areas in which we do not have a property interest that permits us to evict individuals.

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WE WILL NOT discriminatorily exclude union organizers from areas within our leasehold where nonunion individuals engaged in the same activity are permitted.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or modify our no-solicitation/ no-distribution rules that prohibit employee-to-employee solicitation and distribution in areas that are not immediate patient care areas, and which prohibit all solicitation and distribution by employees to nonemployees.

WE WILL rescind or modify our access rules so we do not evict, attempt to evict, or threaten to evict representatives of Service Employees International Union, Local 715, who are handbilling in those areas that are near our facility but not on our property.

WE WILL rescind or modify our access rules so we do not discriminatorily evict union representatives from areas where nonunion individuals engaged in the same activity are permitted.

APPENDIX C — DECISION OF ADMINISTRATIVE LAW JUDGE DATED DECEMBER 26, 2000

NATIONAL LABOR RELATIONS BOARD

Cases 32-CA-16965 and 32-CA-17092

UCSF STANFORD HEALTH CARE

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715, AFL-CIO

December 26, 2000

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. These consolidated cases were tried on October 18-21, 1999, at Oakland, California.[1] The charge in Case 32-CA-16965 was filed by Service Employees International Union Local 715, AFL-CIO (Union or Charging Party), on September 1, 1998, and amended on February 26, against UCSF Stanford Health Care (Respondent). The charge in Case 32-CA-17092 was filed on November 6, 1998. The complaint in Case 32-CA-16965, was issued by the Regional Director for Region 32 of the National Labor Relations Board on November 30, 1998. The complaint in Case 32-CA-17092 was issued August 31, 1998. These cases were consolidated by an order

1. All dates are in 1998 unless otherwise indicated.

dated September 2. The consolidated complaint was issued September 19. The General Counsel amended the complaint at hearing. Respondent initially claimed one or more of the amendments were prejudicial. Respondent was afforded the opportunity throughout this proceeding to demonstrate it was prejudiced or denied due process by permitting the General Counsel to change the alleged date of an incident, with sufficient specificity as to warrant my denial of the amendment. Respondent failed to adduce any evidence supporting its claim of prejudice. I therefore conclude that the amendment was appropriate and the Respondent was not prejudiced or denied due process.

Principally, the consolidated complaint alleges Respondent violated Section 8(a)(1) of the Act by: promulgating on September 21, 1998, a solicitation and distribution rule which contained an overbroad definition of patient care areas in banning employee-to-employee solicitation and distribution; and unlawfully restricted employee solicitations and distributions to nonemployees even in non-working areas of its premises. Respondent issued a letter of clarification on September 21, 1998, which allegedly further improperly expanded the ban to additional areas which are not patient care areas but are areas where patients visit with families and friends; and, Respondent failed to demonstrate it possessed sufficient justification to include the areas where solicitation and distribution was banned by demonstrating such a rule was necessary to avoid disruption of health care operations or disturbance of patients.

The consolidated complaint further alleges Respondent violated Section 8(a)(1) of the Act by evicting or attempting

to evict nonemployee union organizers without demonstrating it had a sufficient property interest within the meaning of *Lechmere, Inc. v. NLRB*, 503 U.S. 527 (1992); that Respondent had, by its actions, broadly invited the public to its premises which, under California law, requires it to permit peaceful union activity on its property; and, the nonemployee union organizers were permitted to leaflet on the exterior premises to the same extent as the general public under the Moscone Act as explicated in *Sears v. San Diego District Council of Carpenters*, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). Charging Party also claims Respondent has discriminatorily enforced its access policy against nonemployee union organizers.

Respondent's timely filed answer to the consolidated complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Principally, Respondent argues the campuses in question are not "public forums" within the meaning of *Robbins v. Pruneyard Shopping Center*, 23 Cal.3d 317 (1979) (*Pruneyard*). Assuming *Pruneyard*, is applicable, the activities of the nonemployee union organizers were not protected under *Pruneyard*. Even if the activities were protected, Respondent's actions were reasonable and not violative of Section 8(a)(1) of the Act. Respondent also argues the Moscone Act does not give nonemployees any substantive rights in this case independent of *Pruneyard*. Assuming the General Counsel is correct about the applicability of *Pruneyard*, to hospitals rather than commercial establishments, comity and Supreme Court precedent demand that *Calkins d/b/a Indio Grocery Outlet*, 323 NLRB 1138 (1997), 187 F.3d. 1080 (1999), cert. denied sub nom. *Calkins v. NLRB*, 529 U.S. 1098 (1999,) and

derivatively *Pruneyard*, not be followed considering the facts and circumstances of this proceeding, and the Board should abandon Calkins because it is contrary to the "spirit of Supreme Court Precedent" and precludes the establishment of a national policy.

Respondent avers its solicitation and distribution rule is not impermissibly overbroad, provides ample alternative locations for employees to solicit and distribute literature and the areas encompassed in the rule are "patient care areas," including hallways "immediately adjacent to the specified patient care areas."

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Based on Respondent's answer to the consolidated complaint, as amended at hearing, I find it meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

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2. I specifically discredit any testimony inconsistent with my findings.

Appendix C

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent was formed in November 1997 by the Regents of the University of California and Stanford University. It is comprised of four inpatient hospitals and various outpatient clinics affiliated with the University of California and Stanford University. Two of the hospitals are located in Palo Alto, California, and two in San Francisco, California. This proceeding exclusively involves the two hospitals located in Palo Alto, Stanford Hospital and Lucille Packard Children's Hospital (Hospitals).

B. The Organizing Drive

About November 1997, the Union commenced an organizing drive seeking to represent certain of Respondent's Palo Alto employees at the hospitals and clinics other than registered nurses.[3] A representation election was conducted in November 1998 for a unit of nonprofessional employees in which the Union prevailed. Since that election, the Union has continued to attempt to organize the remainder of Respondent's unrepresented employees at the Hospitals and clinics. Respondent opposed the organizing effort. The organizing drive was reported in media, including three television networks and three newspapers, the San Francisco Chronicle, the Palo Alto Daily and the San Jose Mercury News. These newspapers are available at the gift shops and/or news stands at the Hospitals.

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3. The nurses were already represented by a union named CRONA.

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C. The Hospitals

Both of these Hospitals are acute care facilities that are located at the northwest corner of Stanford University (University). They are physically attached and are connected via an interior corridor. Generally, the Hospitals lease their facilities from the University. In addition, there are a number of clinics within and/or adjacent to the Hospitals. The Respondent also maintains offices and other facilities at locations not adjacent to the Hospitals. Contiguous to the Hospitals is Stanford University Medical School. The Hospitals, clinics, and Medical school are referred to as the Stanford University Medical Center. The clinics outside the actual hospital structures can be reached by sidewalks, bike paths, and roads. The Hospitals are teaching institutions but Respondent does not operate the Medical School. The Medical School can be reached through Stanford Hospital. The Medical School also contains laboratories that service some of Respondent's patient needs. There is no claim the Medical School is a part of Respondent's leasehold, but Respondent has assumed some responsibility for some maintenance at the Medical School.

The Hospitals are a part of a tax-exempt nonprofit benefit corporation which receive reimbursement from Medicare and Medi-Cal. They also issue bonds guaranteed by the California Health Facilities Financing Authority. According to its mission statement its role is "[f]or the benefit of its patients and the larger community, the mission of UCSF Stanford Health Care is: to care, to educate, to discover." It is undisputed various State and Federal statutes require Respondent to make its medical services available to the entire community.

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Respondent voluntarily makes educational programs available to the entire community. The programs are described in greater detail below.

Its website describes its Stanford Hospital facilities as follows:

> Our hospital, at 300 Pasteur Drive on the Stanford University campus, includes 611 licensed beds.[4] Our clinics offer care in more than 100 specialties. We are located on the northern end of the Stanford University campus at the edge of a expanse of Spanish-style buildings and majestic palm trees. When you approach the entrance of the four-story hospital, fountains and gardens filled with seasonal flowers greet you. Within the hospital, our collection of more than 500 original pieces of art and 1600 posters is on display in hallways, waiting rooms and offices. . . .
>
> Today, the medical center's facilities include the Boswell Building, which is part of the original structure, Blake Wilbur Building; and an outpatient psychiatry facility. . . .
>
> A branch of our health library, which is open to the public, is located in the hospital. The main library is located in the nearby Stanford Shopping

4. Respondent, by Malinda Mitchell, the chief operating officer of Stanford Hospital and Clinics, indicated there are only 450 functional beds at Sanford Hospital.

> Center. (A "virtual" branch of the library can be accessed via the World Wide Web.
>
> Tours of the hospital are conducted every Thursday at 10 a.m. and begin in the main lobby near the information desk. Special tours also can be arranged. . . .

Lucille Packard Childrens' Hospital (LPCH) has about 162 beds. Respondent employs a staff of about 7000 individuals at its Palo Alto campus which includes about 450 interns and residents, 1500 nurses, approximately 1400 service and maintenance employees not including community physicians.

The parties stipulated in the fiscal year ending August 1997, Stanford Hospital had annual revenues in excess of $640 million and LPCH had revenues in excess of $150 million. In the fiscal year ending August 1999, about 19 patients daily arrived at the Stanford Hospital emergency room by ambulance and 82 daily patients arrived at the Stanford Hospital by means other than ambulance. For the year, 181 patients arrived at the emergency department by helicopter. Of those patients arriving daily at the Stanford Hospital emergency department, about 18 were admitted as inpatients. Stanford Hospital admitted about 60 patients a day, of which approximately 25 were nonemergent scheduled admissions. Approximately 15 patients a day were admitted to LPCH. A physician's order is required for all inpatient admissions. About 40 outpatient surgeries were performed daily and 32 other outpatient procedures such as laboratory and radiological tests, which require a doctors order or prescription.

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1. The exterior of the hospitals

The Hospitals are served from the west by Pasteur Drive and from the east and north by Welch Road, Quarry Road, or the Quarry Road extension. The main entrance to Stanford Hospital is on Pasture Drive and the main entrance to LPCH is on Welch Road. Rosemary Monroe testified Welch and Quarry are not private roads.[5] The sidewalks that connect the Hospitals and Stanford Barn[6] also lead to an AndronicO's supermarket and Stanford Shopping Center which is about one-quarter of a mile from the hospitals. The shopping center

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5. The parties stipulated Monroe, Respondent's director of human resources, was, at all relevant times, a statutory supervisor and agent within the meaning of Sec. 2(11) and (13, of the Act, respectively. It was also stipulated Felix Barthelemy was, at all relevant times, either vice president of human resources or senior vice president of human resources, and is a supervisor within the meaning of Section 2(11) and an agent within the meaning of Sec. 2(13) of the Act. It was further stipulated Dennis Smith was, at all relevant times, security manager of LPCH, and is a supervisor within the meaning of Section 2(11) and an agent within the meaning of Sec. 2(13) of the Act.

6. The Stanford Barn is a nearby building between the Hospitals and Stanford Shopping Center. The shopping center contains many restaurants and large and small stores such as Bloomingdale's. Both the Stanford Barn and Stanford Shopping center have free parking. There was uncontroverted testimony some or all of the office space Respondent leases on Welch Road contain parking lots which have signs restricting their use to tenants and visitors, prohibiting hospital parking. The signs do not otherwise define the term visitor. Respondent also leases portions of other buildings more remote to the Hospitals. The parking situations and limits at these remote sites were not detailed on the record.

has free parking. Respondent leases space in the Stanford Barn which also contains a Wells Fargo Bank, and a restaurant called the California Cafe. The Stanford Barn is across the street from LPCH. The specific lessor associated with Respondent of the Stanford Barn office space was not identified. The nature and extent of the leasehold was not described. There may be tenants other than Respondent, the restaurant and the bank in the building. No other tenants of the Stanford Barn were described. It was not established on the record whether any of Respondent's employees included in the units being organized work at the Stanford Barn or traveled between the Stanford Barn or other outlying rented or otherwise maintained facilities and the hospitals.

The General Counsel notes the grounds around the Hospitals are open, not fenced or gated. Respondent has not paced "no trespassing," "private property" or other signs limiting the general public's access to the leasehold. On the outside of the Hospitals are about 25 to 30 benches, some for smokers, picnic tables, and raised planters that incorporate seating. There are no signs limiting access to or restricting the use of the benches, tables, or other outside seating.

Respondent also maintains and operates two multilevel parking structures. One, designated parking structure 3, has between 760 and 769 spaces, which primarily serves Stanford Hospital. Monroe was not sure if Respondent leased this structure from the University. The nature and extent of such leasehold was not clearly established therefore it cannot be concluded Respondent has a sufficient property interest to permit a finding it could seek trespass redress for unwanted incursions in this structure. This parking facility charges a

flat fee of $3.00 per day.[7] This facility is designated for use as patient and visitor parking by signs posted near the entrance to the structure. The term "visitor" was not defined on the sign or otherwise. Charging Party's nonemployee organizers obtained permits from the University to park in this garage. Therefore, Respondent does not maintain exclusive control of the facility. There is also metered parking in this structure which is not subject to the flat fee schedule.

Paul Watkins, Respondent's Support Services Administrator,[8] estimates Lot 3 "changes or turns over five times a day during the daytime hours. . . . On the average of five times a day, so that's approximately 3000 people to and from, so it's a fair number of people, as well as employees. I would estimate that we probably have 3000 employees on a given day, a weekday." Additionally, medical staff enters and exits the facilities as well as people on business and delivery men.

There is also an overflow parking area that can be opened and is used for Respondent's evening and night shift employees. The individual who collects the parking fees from those who do not have parking permits are employees of Respondent. Employees must acquire their parking permits from the University. The record therefore requires

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7. Specifically, the sign at the entrance to the garage states there is no charge for 20 minutes or less, a flat fee of $3 for more than 20 minutes for each 24 hours and a $5 flat fee for a lost ticket.

8. His duties include responsibility for: "facilities engineering, which includes design and construction; security, health and safety, infection control, food service, housekeeping, grounds and I believe that's it — parking, which is part of security."

the conclusion Respondent does not have the authority or right to issue parking permits for the parking structures and lots. The overflow lot is a parking area Respondent leases for night shift employees. The terms of the lease for evenings only have not been presented and Watkins testimony fails to establish Respondent has the requisite property interest to bar all access to this area at all times.

The other parking structure is just north of LPCH and contains 260 spaces. This structure also has a sign that indicates access is limited to patients and visitors. The term visitor was not limited to patients and their visitors or others whose express purposes were related to the operations of the Hospitals. As noted in greater detail below, Respondent has programs and other events that attract the general public. At the entrance to the LPCH structure, there is a gated guardhouse manned by an employee of Respondent, which charges $1.00 per day. The union organizers who have parked in that lot just drove up to the gate, handed the attendant $1 and parked their vehicle. Out of approximately six times parking at this structure, union organizer Ronald Ruggiero was asked once what the purpose of his visit was. The one time he revealed his business, he was permitted to park at the LPCH parking structure.[9] There is also a lot near

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9. The sign near the entrance to this garage reads differently from that in front of the Stanford Hospital garage. The LPCH garage sign reads "LUCILLE PACKARD CHILDRENS HOSPITAL STANFORD PATIENTNISITOR PARKING ONLY UNAUTHORIZED VEHICLES WILL BE TOWED AWAY AT VEHICLE OWNERS EXPENSE." (Emphasis in original.) The parking Structure 3 sign does not have the limiting language "PARKING ONLY" that is contained in the LPCH sign.

the emergency department at Stanford Hospital, which has a gate that is operated by a security guard stationed at the entrance to the Emergency Department.

There are also various parking lots for permitees' use.[10] Monroe testified these lots are owned by the University, not leased by Respondent. There are some metered parking spaces on Pasteur Drive designated "Two Hour Parking" spaces. The University owns and operates at least some of these parking lots which are gated and operated by an access card system. The University sells parking permits, and as noted above, the union organizers obtained such permits from the University. Respondent's employees must buy their permits from the University. There is no evidence the University has a policy concerning who could buy such permits. Obviously, the sale of the permits is not limited to students and/or employees of the University and Respondent since Union employees were permitted to purchase parking permits.

Watkins testified Respondent maintains and operates the two parking structures. Watkins admitted some of the permit parking lots used by Respondent's employees are on University property, property in which Respondent does not

10. The University's policy concerning the acquisition of parking permits was not placed into evidence. The union employees were able to purchase parking permits from the University. There was no information placed in evidence concerning the availability of parking permits for students, frequent visitors, contractors, or the general public. Therefore, Respondent's claim that these lots are for employee parking has not been convincingly demonstrated and the claim is considered mere surmise.

have a leasehold or other clear property interest. Watkins testified the access as well as the solicitation and distribution rules of Respondent apply to those areas Respondent leases from the University but does not apply to those areas where employees park in University lots not leased by Respondent. Since Watkins admitted Respondent has maintenance agreements with the University for property not included in the leasehold, the fact it maintains one or more parking areas does not clearly establish Respondent has a property interest in such areas sufficient to invoke the State's trespass laws.

Further confusing the matter, when Watkins was asked to detail the property leased by Respondent, he answered the Medical Center, which includes the Medical School, an auditorium and other facilities other of Respondent's witnesses testified were not part of its leasehold. Watkins did not specify which document(s) or other predicates he based his testimony concerning the nature and extent of Respondent's leasehold. Specifically, Watkins testified:

> The Medical Center, the main hospital, Stanford Health Services Medical Center, Lucille Packard Children's Hospital, Stanford, the 900 Blake Willbur building, several off-site buildings that are off campus-one at Page Mill, 1520 Page Mill. I'm sorry, there is a very minor exception in that building which we do not have, but predominantly.

We have an entire building at — I'm sorry, I don't know the address but it's on Hanover, the intersection of Hanover and Page Mill. We have another building in which we have

leased the entire building at 1010 Corporation Way. And I believe those are all the buildings in which we have a leasehold on the entire premises.

Further confusing the issue is Watkins testimony, as follows:

> The third [lot] is adjacent to the Emergency department entrance, walkway entry area and parking lot. The sidewalk in which that sign is posted is within the boundaries of the area that we maintain, have full maintenance responsibility and maintain.
>
> JUDGE WIEDER: Is it part of the leasehold?
>
> THE WITNESS: Whether or not it's within the bounds of the leasehold, I could not testify to that.

I find Watkins commingled areas within Respondent's leasehold with property it maintains but has no discreet property interest and he admittedly did not have personal knowledge of the nature and extent of Respondent's leasehold. I also find Watkins did not appear forthright or convincing. Based on his demeanor, I will credit his testimony only when it is credibly corroborated or an admission against Respondent's interests. Supporting this conclusion are: Watkins' admission he engaged in speculation and surmise: he appeared to be tailoring his testimony to fit Respondent's litigation theories; and, he volunteered information.

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There is some evidence concerning whether members of the general public or lessees other than Respondent at nearby buildings would and could purchase such permits. Monroe testified parking permits can be easily acquired and counsel for General Counsel could obtain one by just going to the University's Transportation Department.[11] Some of the parking area near the Emergency Department as well as another University parking area are leased by Respondent for use by Respondent's evening and night shift employees. The terms of the lease and the nature of the leasehold interests include areas not involved in the incidents considered herein. There is no parking permitted along Welch Road or Blake Wilbur Road. There is some handicapped parking near the hospitals as well as drop off and pick up areas near the entrances.

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11. Monroe then modified her testimony and claimed permits for the employee lots must be limited to employees. I do not credit the testimony of Monroe unless it is convincingly corroborated or constitutes an admission against interest based on her demeanor. She did not appear forthright and direct while testifying. She appeared to be tailoring her testimony to favor Respondent's case. The above-referenced change in testimony is a case in point. She admittedly was engaging in surmise because immediately before claiming the permits for such lots were limited to employees, she admitted she did not know the rules, if any, concerning who could obtain such permits. She exhibited a propensity to engage in speculation rather than trying to answer questions candidly form her personal knowledge. Moreover, Monroe seemed to be reluctant to testify frankly about matters she appeared to construe as antithetical to Respondent's interests. On occasion, she had poor and/or selective recall.

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Not all employees, apparently, use permit parking. Ramirez testified, without contradiction, that during a conversation with one of Respondent's security guards, she informed him: "[T]he housekeeper doesn't park in the permit parking. They park in the parking in front, and they use their badge to get inside the parking." This testimony was unrefuted and I have found Ramirez to be a credible witness based on her open and direct demeanor. Harland, another union organizer testified credibly and without contradiction there are permit parking slots at the top level of parking structure 3.

D. Access

During the course of the organizing drive, shortly before the schedualed representation election, Respondent initiated a new rule limiting the access of nonemployee union organizers. On November 2, Respondent sent to its security supervisors the following directive:

> Bill [Garber] and I [Dennis Smith][12] just met with Rosemary Monroe regarding union organizers. There have been many complaints lodged against them by hospital staff and because of these complaints it has been decided that:[13]

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12. Respondent's security manager.

13. The nature and number of complaints was not detailed on the record.

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Union organizers can only be on SH&C and LPCH property from the hours of [7 a.m. and 8 p.m.][14]

They are not allowed to be soliciting inside either hospital. They are not allowed one on one meetings and can eat in the cafeterias but they cannot be soliciting staff who are eating in the cafeteria. If they are heard soliciting, they need to be asked to leave the premises.

If a known union representative is seen inside the hospital holding a meeting with two or more staff, they need to be escorted off the premises.

They are allowed at the entrance to the permit lots but they should not be harassing anyone who is coming to work. Exact locations will be coming out but in the past — they have been at the CVRB Lot and on Campus Drive across from PS1.

There is a letter from Felix Barthelemy, Senior Vice President of Human Resources to Ron Ruggiero, Organizer for SEIU, redefining UCSF Stanford Healthcare's position on union organizing on the premises which should be carried by yourself and all officers.

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14. The memorandum contained an error and the parties stipulated the ours the Union was limited to be on the property was between 7 a.m. and 8 p.m.

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Under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), nonemployee organizers are not authorized to trespass, subject to limited exceptions[15] not applicable in this proceeding. *Lechmere*, Id. at 535, holds state trespass law obtains. Therefore, the issue is, first whether Respondent has a property interest in the areas where the removal incidents occurred, and if so, whether, under California law, the nonemployees were trespassing. Consonant with the Lechmere decision, the Board held in *Calkins d/b/a Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997):

> [I]n cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property. [emphasis in original]." *Food for Less*, 318 NLRB 646, 649 (1995), aff'd in relevant part 153 LRRM 2291 (8th Cir. 1996) See, e.g. *Payless Drug Stores*, 311 NLRB 678 (1993), enf. denied on other grounds by unpublished decision (9th Cir 1995); and *Bristol Farms*, 311 NLRB 437, 438 (1993).

. . . .

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15. There is no claim and no evidence the nonemployee organizers do not have reasonable access to employees outside the employer's property, therefore there is no need to consider the accommodation between private property rights and statutory rights under the Act.

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In determining whether an adequate property interest has been shown, we look to the law that created and defined the Respondent's property interest, which is state, rather than Federal, law. Bristol Farms, above, at 438.

1. The alleged removal or attempted removal of nonemployee union organizers

a. The September Incident

The events are mostly undisputed. The first incident occurred in September 1998. At about 5 or 6 p.m. former union organizer Bruce Harland,[16] was seated in front of the main entrance to LPCH waiting for a clerical worker to end her shift. They had made an appointment to meet after the clericals workday. According to the unrefuted testimony of Harland:

When I waited for her, I was — a security [guard] that I was familiar with approached me and told me that I knew that I — He said you know that you're not supposed to be here and you need to leave. And I said I am waiting for a ride and this is where my ride is going to pick me up. I'm not talking to anybody, I'm not doing anything, I don't know why you're bothering me.

And he says, well, you're not supposed to be here and you need to come with me. And he walked me to the end of the street on Welch Road and he told me don't come back.

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16. Harland left the Union's employee prior to testifying.

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Since Harland wanted to keep the appointment, he walked back to the hospital. The clerical worker was waiting for him. They were met by the clerical worker's daughter who drove them away. Before he was approached by the security guard, Harland noticed there were other individuals waiting for rides in the area. There were also some people smoking in the area of the smoker's benches. There were a few individuals entering and exiting LPCH. The guard did not instruct any of the individuals in the same area as Harland that they should not be there. According to Harland's undisputed testimony, the area where he was waiting is a popular location to meet rides, including private vehicles, taxis and airport shuttle buses. Harland described the area as follows:

> [I]t's a kind of a circular driveway with some trees decorated like animals, cut in shapes of animals, and there's a bench outside of the main glass doors which is on the other side of the admitting room. And a few feet from those benches are some more benches where smokers are permitted to smoke. And then the newspaper racks are across that bench from — that's right by the admitting that you've heard.

There is no evidence or claim Harland was impeding traffic, precluding clients or visitors from any activity or engaging in any other objectionable conduct. The parties stipulated this incident occurred within Respondent's leasehold. Harland seemed to be attempting to answer all questions truthfully and fully, without devise or obfuscation. He exhibited good recall of the events. Therefore, I find his testimony is believable.

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b. The Incidents Involving Marta Ramirez.

Marta Ramirez is a nonemployee lead organizer employed by the Union. She had three incidents where she was asked by Respondent's security guards to leave an area at or near a bus/shuttle stop described in greater detail below. Ramirez testified in a direct and believable manner. Her recollection of the events appeared unembellished, she seemed to be attempting to testify in an accurate and complete manner. Based on her demeanor, I credit her testimony. Supporting this conclusion is her ready admission when she could not recall or when she did not know. She did not engage in surmise or distortion.

During the first incident, Ramirez was seated in one of Respondent's cafeterias with three workers discussing a Union leaflet when she was asked, first by one security guard who was joined by another guard, if she was a union representative. When she responded in the affirmative, the guard(s) informed her "[b]ecause if you are a union representative, you have to leave[17]."

Ramirez agreed to leave and departed the cafeteria. Then:

> They said that they going to accompany me to the outside, and we walk outside and they asked me where is my car and — No, I'm sorry. They asked me — Because that was another incident. They asked me you have to go outside with us, and then they asked me how — they asked me where is your car, and I said, well, I came on the Marguerite. And then

17. Respondent's actions in the cafeteria are not alleged to be a violation of the Act.

> they say, well, we're going to wait with you until the Marguerite comes. That's the shuttle.

And while we was waiting there, I asked them — They told me you can't be talking with workers here. And I asked — I know that we can talk to workers at the cafeteria and they said yes, only if you are talking with one worker, not in a group. And then they said — so you mean that I can't talk to a group of workers anymore, I have to talk to only one worker? And he said yes, and you have to have an appointment. And I said, well, I had an appointment with them, and they said, well, but it was a group, it was not only one person.

And I told them, well, I can't leave because I have another appointment at 12, and they said well, then you can't wait here. You have to go to permit parking.

The guards escorted Ramirez to an area designated "A Parking". When they reached this area, one of the guards informed her:

> [Y]ou have to wait for the workers where they park. And then I said, well, the housekeeper doesn't park in the permit parking. They park in the parking in front, and they use their badge to get inside the parking. So you're telling that I can't wait for them there? And he said, well, I can't continue arguing with you and they left.

Ramirez waited for the housekeeper at the parking lot because the guard prohibited her from waiting in the area near the bus/shuttle stop. She denies the guard informed the

property near shuttle stop and street was the property of Stanford University or Stanford Hospital, he only stated they were Stanford property. Inasmuch as the statement was made by one of Respondent's guards instructing the union organizer she was not permitted on the property. I credit her testimony the guard indicated he was authorized to remove her from the area around the shuttle stop. Respondent instructed Ramirez she could not sit or stand at the bus stop merely to wait for one or more of its employees.

Ramirez was at or near the shuttle stop when the guards informed her she could not wait there that she had to wait at a permit parking area. She estimated she was at least 50 feet away from the entrance to the Emergency Room. There are two shuttles that serve the area, including the Hospitals and the University. One shuttle bus which connects the Hospitals to Bay Area Rapid Transit and Caltrain at the Palo Alto train station. There is also a free shuttle called the Marguerite shuttle that also connects riders to the Palo Alto train station. The shuttle and bus services are open to public use without restriction.

Stanford University provides the Marguerite shuttle service which operates on Monday through Thursday from 8 p.m. to 12 a.m. and on Friday from 8 p.m. to 2:30 a.m.; on Saturday from 4 p.m. to 2:30 a.m. and on Sunday, from 4 p.m. to 12 a.m. There are shuttle/ bus stops on Pasture Drive, Quarry Road and Quarry Road extension. Traffic is limited to certain types of vehicles on Quarry Road Extension.

There is also public transportation called the "Sam Trans BART Caltrain" connection that serves the University,

Stanford Hospital, LPCH and other locations on the Penninsula, an area south of San Francisco. This service operates from the Hospitals to Daly City, where it terminates at a Bart station.[18] In addition to serving Daily City, this bus serves the communities of Colma, South San Francisco, San Bruno, Milbrae, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto. This bus also connects to transfer points with other SamTrans bus routes serving many other areas of the peninsula south of San Francisco, California. The Marguerite shuttle uses some if not all of the bus stops.

Respondent does not operate, fund or control either the Marguerite shuttle or the SamTrans bus service. Monroe does not believe the bus and/or shuttle stops are on Respondent's property. There are about three shuttle/bus stops on Quarry Road and Quarry Extension, and Ramirez was escorted by Respondent's guards to the stop nearest the Emergency Department of Stanford Hospital. Mitchell also does not believe the shuttle stops are on Respondent's leasehold, testifying "[o]ur property line does not go out to the street . . . . I can't tell you the exact number of feet. It goes a number of feet from the building, but Facilities people will have to give you the exact number of feet from the building. It's a short number of feet from the building." She estimated the leasehold interest was less than 10 feet from the buildings.

Ramirez described the bus/shuttle stop as an area that has a shelter with a bench across from Stanford Hospital.

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18. Bart is a rail carrier serving a significant portion of the San Francisco bay area.

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On the other side of Quarry Road there is a side walk and seating areas around a tree. The sitting areas include a bench and a planter which people use for seating. The guards escorted Ramirez to this area by the tree. There were other people in the area at the time who were sitting on the bench. The guards did not ask the people seated on the bench to identify themselves. Ramirez had an appointment with a housekeeper whose shift was to end at noon. They were to meet at the bench near the tree. This location was well over ten feet from the Stanford Hospital building. Ramirez asked the guards whose property the area around the tree was and the guards replied "everything around here, all the streets, belong to Stanford. You can't be around anywhere. This belong to Stanford properties."

Watkins admitted Respondent's leasehold interest is different at the four shuttle/bus stops near Stanford Hospital and LPCH. The stop closest to LPCH, according to Watkins, is not within Respondent's leasehold. The next stop south of the LPCH stop is also, according to Watkins, not withhin Respondent's leasehold. The third stop, which is near the Emergency Department entrance and the site of the incident involving Ramirez, is maintained by Respondent but Watkins does not know if it is part of Respondent's leasehold.[19] Watkins testified Respondent maintains areas that are not within Respondent's leasehold under one or more contracts with Stanford University and/or the Medical School. There is no evidence to support a claim Respondent has a property interest in the areas it maintains outside of its leasehold.

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19. Watkins later testified the shuttle/bus stop itself is not within Respondent's property, but he has no knowledge that the benches are within the leasehold.

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The fourth shuttle/bus stop is by the Medical School and is not within Respondent's leasehold according to Watkins but Respondent has a contract with the University under which it maintains this area. According to Watkins, the bus/shuttle stops across the street from the Hospitals are not within Respondent's leasehold or maintenance contract; "[t]he curb line is the demarcation." Watkins opined the benches at or near the shuttle stop were within Respondent's leasehold. The exact distance from Stanford Hospital of these benches was not adduced in evidence, thus it cannot be determined that they are within the 10 foot perimeter mentioned by Monroe. Watkins admitted he did not possess the requisite knowledge to claim with certainty this area was within Respondent's leashold or that Respondent otherwise held a sufficient property right in the area to permit it to deny nonemployee union organizers access.

Watkins described the benches near the Emergency Department bus/shuttle stop as not facing the road and about 20 to 30 feet away from the bus stop. Watkins understood the benches to be within Respondent's leasehold. The disparity between Monroe's and Watkins' testimony concerning the parameters of Respondent's leasehold was never reconciled on the record. While Watkins testified initially there were no shelters at any of the shuttle stops, one of the pictures entered into evidence by Respondent depicts such a shelter at the bus/shuttle stop. The bench depicted in this picture,[20] near a tree, does face away from the road. The perspective of the picture fails to present a clear determination of how close the bench is to roadway or

20. R. Exhs. 52-55.

the Hospitals. There are also picnic tables and a smoking area in the vicinity of the bus/shuttle stop that Ramirez observed being used by individuals for eating and smoking.

The individuals involved in this incident, according to Ramirez, were identified as Stanford Hospital guards based on their uniform of grey pants and blue shirt. They were wearing badges with their names. She had previously seen these guards working at Stanford Hospital in the area of the Emergency Department. This identification was not convincingly refuted.

Ramirez used the Marguerite shuttle to get to Stanford Hospital on this day and has used it on other occasions. She was never asked for identification as a condition of using the shuttle. Stanford University provides office space to the Union on its campus and Ramirez uses the shuttle to go to and from this union office located in a building known as the "Eating Clubs." The Union represents some of the employees of Stanford University.

The week after Ramirez was asked to leave the cafeteria and the bus/shuttle stop area, on a Tuesday morning, Ramirez and about five of her union co-workers were leafletting on the sidewalk in front of the previously described shuttle stop near the Emergency Department. Ramirez observed one of Respondent's security guards, a Mr. Lyons, approach the union organizers. He stopped to talk with one of the organizers who was discussing the leaflet with some of Respondent's employees, then came over to the organizers with Ramirez and addressed Ramirez as follows:

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> [Y]ou and me, we already talk about this. You have to leave, and then he start doing like this to me, "Shoo, shoo, shoo,[21]" and I just went like this (indicating), and I thought that he was going to come over me and then his phone, someone called him on his phone and then he left.

I didn't know what to do when he was like over me. I thought that he was going to hit me or something, because he was doing like this (indicating), but then when he left, we stayed there and everybody was asking what's wrong with him, he just came to you. And then we stayed there because there was other workers that they were — we passed them leaflets and then we heard that there was a problem on the other side of Children's Hospital.

At the time of this incident Ramirez noticed individuals going to the parking lot and into the hospital. There were individuals seated at the planter. There is no claim these individuals were also asked to leave Respondent's leasehold. After awhile, Ramirez left the area and went to her car which was located in a parking lot.

Shortly after this incident, Ramirez was at or near the same location with other union organizers in front of the same shuttle stop when a security guard approached them and

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21. Ramirez' replication of Lyon's gesture was described as:

> [O]ne that begins with arms sort of folded in front, in the chest, with back of hands moving outward and to straighten the arms, as if one were shooing away something.

inquired if they were union representatives. When they replied in the affirmative, the guard informed them:

> [W]ell, you guys need to leave. You can't be here at this time.

And we told him, well, we have been here for most of the time we come here at this time and we do the same. And he says, well, the rule has changed. You have to leave.

Ramirez did not recognize the guard but he informed her he was in charge that night. He was wearing the Stanford guard uniform of grey pants and a blue shirt. He was also wearing a badge with his name and picture on it. She was leafletting at 10 p.m. because some of Respondent's employees in the unit the Union sought to organize began work at 10:30 or 11 p.m. and it was difficult to contact them during the day. At the time of this incident, another individual was seated on the bench who was not affiliated with the Union. The guard did not ask or tell this individual to leave. There was another individual in a car parked near the emergency area who was not asked to leave.

At the times of these three incidents, Ramirez claims, without refutation, that the union organizers were not blocking ingress or egress to the hospital, they were not creating any disturbances and no employees complained to her about their presence or activities. While Respondent's memorandum changing its policy concerning the union organizers access mentions employee complaints, Respondent adduced only two incident reports detailing these asserted complaints. The first incident report, dated

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November 21, 1997, appears to have involved leafletting at a parking area, not inside the Hospitals established leashold. The second report, dated August 5, 1998, noted a security officer received a report from an employee that a union representative telephoned while she was working in the pharmacy to solicit her to join the Union. This complaint clearly did not involve handbilling by nonemployee union organizers.

Respondent admitted that it receives about 1,200 patient complaints yearly at Stanford Hospital and 300 yearly at LPCH of which few, if any, involve employee solicitation or distribution. Respondent also argued on brief, contrary to Monroe's testimony, that it did not adopt the policy in response to particular patient, physician or other employee complaints about solicitation. Respondent claims the policy is needed to create the appropriate atmosphere for patient care.

Ramirez admitted returning to the shuttle stop many times after these incidents to continue with her organizing work. At one or more of these times she saw guards employed by Respondent but she does not know if they saw her. After these three incidents, no one sought to remove her from that location even though she continued leafletting up until the election. The leaflets were directed to Respondent's employees, some of whom also engaged in leafletting. Ramirez did not see anyone other than union organizers and involved employees leafletting at Respondent's facilities.

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c. The November 2, Incident.

On or about November 2, the same date Smith issued his memorandum to security supervisors quoted above, nonemployee union organizers Solito Barana, Brian Hooper and Bruce Harland were assigned to leaflet at LPCH. They began leafletting at about 6 a.m. on a side walk near a parking area across from the back entrance to LPCH. The location was described as a convergence of walkways between Quarry Road and LPCH. They were about 15 to 20 feet from the back entrance to LPCH. That location was selected because it was near the entrance used by most of the LPCH employees going to and leaving work. This employee entrance is limited to card key access only, so only individuals who possess such a card can enter at this location. The union organizers selected the early hour for leafletting based on when they could reach the most employees beginning and ending their shifts. The union organizers established three shifts for leafletting; one in the morning from 6 to 8 a.m., the second in the afternoon from 2:30 to 4 p.m., and the third at night from 10 p.m. to midnight.

The sole purpose of the union organizers for being at that location was to hand out flyers to Respondent's employees. According to the unrefuted and credible testimony of Harland, the union organizers handbilled at that location weekly. They identified the employees by their uniforms and identification badges. Some employees passed by who did not wear badges or uniforms such as secretaries and some

supervisor[22]s. It is undisputed the principal if not sole users of the entrance to LPCH clossest to the handbillers were employees of Respondent.

According to Barana, whose testimony is credited based on his open and convincing manner:[23]

> So as we were handing out flyers to the workers as they came in, around 6:30 a security guard[24]

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22. While Barana admitted some individuals identified themselves as supervisors who declined receipt of the leaflets, there is no evidence of a confrontation or disturbance on this or any other day between union organizers and employees other than security guards.

23. Barana is an employee of the Union who was assigned to its Stanford office during the fall of 1998. While his direct and open demeanor alone warrants crediting his testimony, I note he testified in a consistent manner with no indication of device or obfuscation. Barana also exhibited good recall of the events.

24. Harland recognized the security guard as an employee of Respondent who worked the night shift. Harland's version of the event closely tracks that of Barana. According to Harland:

> [The security guard] came out and he said you guys know you're not supposed to be here. Stop the leafletting. And we said, well, what do you mean, we're not supposed to be here? We've been here every week and you know that.
>
> And he said if you don't stop, then I'm going to call the police. And we said, well, we're going to

(Cont'd)

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(Cont'd)

> continue to leaflet until you call the police and have them tell us to stop. And in that time he called more security guards. . . . He had a radio.
>
> And he called more security guards, the majority of them from Stanford. I don't believe any other security guards from Lucille Packard came. The reason why is because their uniforms are different, and all of the security guards had grey pants and blue shirts, and that's a Stanford security uniform.
>
> They did tell us to all stop and they wanted to show us this memo that they had. . . . And they said that this says that we can't be there until 7:00 a.m. And all three of us said, well, we don't have that Our supervisor hasn't given that to us. We're not aware of this memo, and so we're going to continue to leaflet until if you want to, call the police and have them tell us to leave. Then we will leave then.
>
> And then a couple of the Stanford officers left and the police came shortly after that, like 7:45 — I mean, 6:45, I'm sorry.

Barana dealt with the police while Harland and Hooper continued to leaflet.

> Then they called us over there, the police officer did, and asked if he can see our driver's license, and he radioed in to his headquarters or wherever that goes, and they ran a check on us. You know, he explained that he was part of a union and that, you know, there was really

(Cont'd)

> came out and asked what we were doing there. We said, you know, we were passing out flyers. He said we couldn't be there before 7 O'clock in the morning, and I said I wasn't aware that the policy has changed. And then he said if we did not leave, that he would call the cops.

So I said we were not leaving, so we continued passing out the flyers.

That guard left[25] and a few minutes later he returned with four other security guards from Stanford Hospital and an individual Barana believed was the guards' supervisor

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(Cont'd)

> nothing — he told the security guards there's nothing we can do, that if they're not threatening someone or hurting someone or, you know, being abusive to someone, and that they were going to just leave it at this.
>
> Then the security guard that first approached us in the morning wanted to file some type of report through the hospital and said that he wanted each of our driver's licenses. And the police officer told him that you don't get the driver's license, you don't get their names, this is where it ends. And he didn't want to be called back today.

25. The first guard was wearing a uniform used by LPCH guards consisting of polo shirt, khaki pants and a blue jacket. The guards that he brought back with him were wearing grey pants and blue shirts which is the uniform for Stanford Hospital security guards. Both Harland and Hooper recognized the first security guard as an agent of Respondent from meetings on previous occasions.

because he took a lead role in the conversations. Barana recalled the lead guard "asked us what we were doing, and I told him we were handing out flyers to the workers. And he said we couldn't be there." The lead guard then showed the union organizers the November 2 memorandum quoted above[26] and said: "this memo said you couldn't be here, and I said that is a memo addressed to your department. I am not aware that the union has received a memo like this." The lead security guard then stated "he was going to call the Palo Alto police" and left.

The union organizers continued leafletting and about 6:45 a.m. two Palo Alto police office arrived as well as the security guard with whom they had the first conversation at about 6:30 a.m. This security guard informed the police officers the union organizers were not supposed to be there. One of the officers asked what they were doing. The union organizers replied they were leafletting workers. The officer, who was holding the same memorandum the security guard had previously showed Barana, inquired if they knew they

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26. Respondent argues the copy it retrieved of the memorandum indicates it was not distributed through Respondent's e-mail system until 3:49 p.m. on November 2, therefore it could not have been shown to Barana and the police officers. I find this argument unpersuasive. The memorandum could have been sent more than once, with the copy that was sent later being the one provided by Respondent for introduction into evidence. Based on Respondent's security guards actions, they were following the directives of the memorandum prior to 3:49 p.m., changing established procedure that permitted the Union to handbill on a regular basis in the same area for about 1 year. Accordingly, the probabilities require the conclusion Respondents security guards received a copy of the memorandum prior to confronting the union organizers at 6:30 a.m.

were not supposed to be there. Barana replied "that memo is an internal memo to the department. I am not aware of any policy change with regard to our presence here. We've been doing this for the past year on a regular basis and we've never been asked to leave until this present time."

Barana also informed the police officer:

> [W]e're two weeks until the election and I believe that's the reason why they're asking us to leave. So the cop said we're in a union also. As long as you're not harassing the workers, that's fine. But he said I'm going to take down your names and he took down our names. He asked for our driver's licenses, we showed him our licenses, he took down our names.

And then the security guard said, okay, let me take your names also, and the cop said you don't have to do that. He already took care of it. So the cops left and we stayed, and we continued to leaflet until 8:30.

Barana's testimony the union organizers were not blocking the entrance or exit to the hospital or parking area, and there were no disturbances, disruptions, or confrontations between the union organizers and the employees who were not security guards is not convincingly refuted. There was no claim or evidence that the leafletting created litter or interferred in any manner with Respondent's operations. There is no claim any patients or visitors were disturbed by the handbilling. There were other individuals on the pedestrian path who were not wearing uniforms. One

individual was in a vehicle waiting to pick up a family member and other individual who appeared to be waiting at the bus/shuttle stop at that location. None of these individuals were handing out flyers but one individual, the gentleman in the vehicle,[27] was stopping people passing by that he knew, greeting them and asking how they were.

Hooper recalled seeing at the time of this incident a delivery man in a bread or food delivery vehicle taking food supplies into the cafeteria and well as pedestrians going in different directions. The security guards did not approach these individuals and inform them they could not be on or near the pedestrian walkway at that early hour. There were no signs indicating the union organizers were on private property. By the time the police officers left, most of Respondent's employees had started or ended their shifts and there was very little if any employee traffic. The union organizers stayed for about ten more minutes and then left.

In addition to Harland, Hooper convincingly corroborated Barana's version of the November 2, events. Hooper testified with an open and forthright mein. He demonstrated good recall of the events. He did not appear to be conforming his testimony to a litigation theory or engaging in hyperbole. Accordingly, I credit his testimony.

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27. Harland recognized the man; he was present and waiting for an employee every time he leafletted in that area. He also recognized a women he went to school with who was a professor at the University of San Francisco; he did not know why she was at LPCH. No guards approached her to ask her purpose for being at that location. He also observed men wearing suits who similarly were not approached by the security guards.

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d. Respondent's property interest

Respondent has several instruments including a Restatement of Lease By and Between the Board of Trustees of the Leland Stanford Junior University and LPCH dated November 1, 1997,[28] a Management Services Agreement between LPCH and UCSF-Stanford Healthcare effective November 1, 1997; an Assignment of Lease (Hospital and Hoover Pavilion) By and Among the Board of Trustees of Leland Stanford Junior University, Stanford Health Services and UCSF-Stanford Health Care entered into November 1, and a Restatement and Assignment of Lease (Boswell Clinic Building) By and Among the Board of Trustees of Leland Stanford Junior University, Stanford Health Services and UCSF-Stanford Health care, entered into November 1, 1997.

The lease of LPCH has a description of a portion of the leasehold involved herein but no map or testimony by an expert, such as a surveyor or qualified engineer, establishing the parameters of Respondent's leasehold and easements. The parties stipulated the incident involving Harland sitting on a bench waiting to meet an employee leaving work was within Respondent's leasehold and I find, based on the stipulation, that Respondent had a valid property interest at the time of the incident. Respondent did not clearly establish on the record it had a similarly valid property interest in the pathway where the November 2, incident involving Barana, Harland and Holland.

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28. The original lease was dated as of April 17, 1986.

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The Management Services Agreement between UCSF-Stanford Health Care and LPCH does not more clearly define Respondent's leasehold. The reassignment and assignment of the lease between the University and Stanford Hospital and UCSF-Stanford Health Care contains a site plan of Hoover Pavilion and Stanford Hospital. There was no clear and convincing testimony the site plan includes only the survey description of the leasehold described in the Agreement. Respondent did not call a surveyor or other expert to demonstrate the incidents involving Ramirez at or near the bus/shuttle stop was within Respondent's leasehold.

Further complicating the issue of the extent of Respondent's leaseholds is certain paragraphs of the Stanford Hospital lease agreement. Paragraph 6.4 of the Agreement provides:

> Parking. Concurrently with the execution of this Lease, Landlord and Tenant have entered into that certain Inter-entity Agreement of even date herewith, which among its provisions shall govern Tenant's rights to use parking facilities located in the vicinity of the Premises.

Paragraph 6.5 of the Agreement provides:

> Palo Alto Agreement. Tenant acknowledges that Landlord has certain obligations to the City of Palo Alto arising out of the agreement between landlord and the City of Palo Alto, dated July 1, 1968, providing for the transfer of the City of Palo AltO's interest in the then-existing hospital to

> Landlord. As further consideration, Tenant covenants and agrees to continue to assume and take all actions necessary to fulfill Landlord's obligations under said agreement and to assume and take all action necessary to fulfill any future obligations arising under said agreement as now constituted.

The "parking" provision indicates Respondent's leasehold interest does not exclusively extend to the parking lots. The record does not clearly establish that the Inter-entity agreement referenced in the "Parking" provision was the agreement in which the provision is contained or another agreement that is not in evidence. Moreover, what, if any property interest or limits on property interest arising out of the agreement with City of Palo Alto ws not placed in evidence. There is no basis to find Respondent has any property interest affecting determinations in this proceeding arising out of such agreement.

As here pertinent, the Management Services Agreement requires LPCH, Stanford Hospital and UCSF-Stanford Health Care, to operate the Hospitals to support the research and clinical programs of Stanford School of Medicine, which adjoins Stanford Hospital but is not part of the leasehold. Moreover, paragraph 3.2 of this Agreement limits Respondent's authority over the leased LPCH and does not include "written policies regarding purchases, contracts and leases which have been approved by [LPCH's] Board of Directors." Any such leases, contracts or purchases, as they may affect Respondent's property interest in the location of the November 2 incident, were not disclosed on the record.

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At the very least, the nature and extent of Respondent's leasehold interest in the location of the November 2, Barana, Harland and Hooper incident, is not clearly established on this record. The lease of the Boswell Building does not clarify Respondent's leasehold interest in the site of the November 2, Barana incident or the /bus/shuttle stop incidents involving Ramirez.

e. Conclusions

While Respondent has some responsibility to maintain portions of the University's property under an agreement other than the leases, the nature of these obligations has not been clearly demonstrated to create a property right sufficient to permit Respondent to deny any access to these areas. For example Watkins, who was proffered by Respondent as the expert concerning Respondent's facilities testified as follows:

> The third [bus/shuttle] stop is adjacent to the Emergency department entrance, walkway entry area and parking lot. The sidewalk in which that sign is posted is within the boundaries of the area that we maintain, have full maintenance responsibility and maintain.
>
> JUDGE WIEDER: Is it part of the leasehold?
>
> THE WITNESS: Whether or not it's within the bounds of the leasehold, I could not testify to that.

Watkins admitted the mere fact Respondent maintains some property under some agreement with the University

does not establish that it has a leasehold interest in that property. For example, Respondent performs housekeeping services at Stanford Medical School but clearly does not have a leasehold interest in that property. Respondent was informed at hearing that the meets and bounds description in the leases do not clearly present its property interests; that there are experts who translate those descriptions into maps clearly depicting its property interest. Respondent chose not to present such experts or any other clear and generally acceptable depictions of its property interests. Watkins testified there is such a boundary map that he had seen. That map was not placed in evidence.

The maps attached to the Stanford Hospital lease do not clearly depict the boundaries of this leasehold, but do include a map of an area encompassing the Stanford Shopping Center, the Medical School, and a plat of Stanford Hospital which does not depict the boundaries beyond the building in a meaningful and dispositive manner. The consulting engineers who prepared the plat of the Stanford Hospital lease were not called to testify whether the leasehold extends to the bus/ shuttle stop near the Emergency Department entrance to Stanford Hospital on Quarry Road Extension. In fact, only Quarry Road is depicted on the plat, not the extension. There is no comparable plat for LPCH, thus no clear showing the November 2, incidnet involving Barana, Halrland and Hooper occurred withing any of Respondent's leaseholds.

Respondent claims it did not create and does not have any incident reports concerning all the incidents with nonemployee union organizers. No incident reports or other documentation other than the November 2, policy statement

indicates there were any complaints concerning the leafletting of the nonemployee union organizers. Respondent did not adduce any testimony or other evidence supporting this bare claim of complaints. As noted in *Bristol Farms, Inc.*, 311 NLRB 437, 438 (1993):

> Further, an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities. [footnote ommitted] See *Polly Drummond Thriftway*, 292 NLRB 331 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB 352 (1986), enfd. mem. sub. nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).
>
> . . . .
>
> To determine whether the Respondent had a property right entitling it to exclude the union agents from the sidewalk in front of its store, we must look to the law that created and defined the Respondent's property interest. It is well established that property rights generally are created by state, rather than Federal, law. At the Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):
>
> > Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[. . . .]

The Board continues to follow this rule of law. In *Calkins, d/b/a Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), the Board reiterated the holding of *Food for Less*, 318 NLRB 646, 649 (1995), affd. in relevant part 187 F.3d 180 (8th Cir. 1996), cert. denied 29 U.S. 1098 (2000) as follows: "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property."

There is no question the nonemployee union organizers were engaged in protected concerted activity under section 7 of the Act and their peaceful action did not cause them to lose any protections of the Act. Respondent argues the Board should abandon Calkins, Id., claiming Calkins, is inconsistent with the spirit of Supreme Court precedent and results in the "impermissibl[e] subordination of what should be a uniform body of Federal labor law to a patchwork of State property and Constitutional law. I find this argument to be without merit. As the Supreme Court held in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534-535 (1992):

> If there is any question *Central Hardware* [*Co. v. NLRB*, 407 U.S. 539 (1972)] and *Hudgens* [*v. NLRB*, 424 U.S. 507 (1976)] changed Section 7 law, it should have been laid to rest by *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 98 S.Ct. 1745 (1978). As in Central Hardware and Hudgens, the substantive Section 7 issue in Sears was a subsidiary one; the case's primary focus was

> on the circumstances under which the NLRA pre-empts state law. Among other things, we held in Sears that arguable Section 7 claims do not pre-empt state trespass law, in large part because the trespasses of nonemployee union organizers are "far more likely to be unprotected than protected." 436 U.S. at 205; permitting state courts to evaluate such claims, therefore, does not "create an unacceptable risk of interference with conduct which the Board, and a court reviewing the Board's decision, would find protected. . . ."

I conclude Respondent has not met this burden concerning the incidents at or near the bus/shuttle stop and the incident concerning the leafletting near a parking facility.[29] While Respondent introduced the leases, the description of the leaseholds were in metes and bounds. These descriptions were not translated into maps, plats or verbal descriptions that would be readily understandable and subject to meaningful examination by opposing parties. I find the descriptions in metes and bounds are akin to a foreign language which the proponent of the evidence bears the burden of translating. Respondent failed to introduce such a translation. Moreover, Respondent admitted in its brief its

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29. I informed Respondent, as follows

JUDGE WIEDER: And there are experts who do make surveys to depict that in a map form so we could get a discrete amount, which—but at this juncture, this witness states that he doesn't have—he's not privy to that information, and you're asking him questions where he's required to speculate and I can't place any weight on that testimony.

witnesses, Watkins and Monroe, did not know the boundaries of its leasehold and it maintenance responsibilities for some University property does not establish any claim that property is "necessarily situated within its leasehold." Accordingly, I find Respondent failed to demonstrate the incidents involving Ramirez and Barana, Harland and Hooper, were not clearly shown to involve property where Respondent held the right to exclude or attempt to exclude the union agents. Bristol Farms, Inc., supra.[30]

f. Public access to the hospitals, is it a public forum?

1. Exterior

Assuming Respondent clearly established all the non-employee union organizer incidents occurred within Respondent's leasehold, General Counsel and the Union argue Respondent does not have the right under applicable state trespass laws to remove the nonemployee union organizers. There was no evidence adduced concerning the University's policies involving leafletting or other union activities. There was evidence the University made office space available to the Union and gave union organizers permits to park on the lots maintained by Respondent. The issuance of these permits by the University to Union personnel is a further indication Respondent does not have

30. The issue of whether the Union had other reasonable means of communicating under *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), is not an issue in this proceeding. The issue of whether the Union had other means to reasonably communicate its organizing campaign messages without access to Respondent's leasehold was not addressed on this record.

an exclusive property interest in parking lots and other areas near the Hospitals. There is no evidence Respondent has an exclusive property interest in other areas not included in the leases but which it has contractually agreed to maintain.

Charging Party argues Respondent is required by State and Federal laws to serve the entire community. Monroe testified Stanford Hospital must make its Emergency Department available to all who seek to avail themselves of its services. As a Medi-Cal participant, Respondent must render services to Medi-Cal patients. As discussed in greater detail hereinafter, Respondent also reaches out to the neighboring community to advertise its services to the whole community, without differentiation between current and potential customers. Respondent has not posted any "private property" or "no trespassing" signs on its leasehold.

Respondent does not have and/or enforce a check-in policy because, as Watkins testified: "[t]he sheer volume of people coming in, for one thing. I don't think it would be practical. And the difficulty in ascertaining whether somebody, the legitimacy of their — of the reason given for entry, for coming in. I think it would be next to impossible to determine the legitimacy of each person entering the building." Watkins further explicated: "the number of people entering and exiting the building at any given day or even, for that matter, any given time of day during the business day hours. It's just a very large number of people."

Stanford Hospital does not have a sign-in policy. Contrary to Watkins' testimony, LPCH does have a sign requesting visitors to sign in but Respondent admitted, "[d]uring the daytime [signing in] is not a requirement, and

generally that sign is turned around during those hours. . . . So as not to be read. It's turned against the wall; it's a one-sided sign, generally."[31] The nonemployee union organizers testified they entered LPCH numerous times and were never stopped or requested to sign in. There is an entry to LPCH through an interior corridor with Stanford Hospital which does not have such a sign or other impediment to access. Particularly during the day, Stanford Hospital is open to the public. Respondent admitted the information desk was not fully staffed during the day at the times here under consideration. Accordingly, I find the LPCH sign in policy was not observed at all pertinent times.

One employee organizer, Paul Trudeau, who appeared pursuant to a subpoena, is a seating clinician whose duties include customizing wheelchairs. He has worked for LPCH for 10 years. He does not work on site. His work location is about six miles from LPCH. He distributed leaflets at his work site and at two locations outside the Hospitals. One such location was by the road near the parking lot close to the emergency entrance to Stanford Hospital and the other between parking lots marked C and D close to parking structure 3. He leafletted in those locations between August and November during the hours of 6 and 8 a.m. There was no evidence nor claim his remote worksite was a patient car area.

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31. There is a sign on the main entrance glass door to LPCH which states "All Visitors Please Check in at the Information desk." The sign that is turned around against a wall during the day so it cannot be read provides: "All visitors please check in at the Information Desk at the first floor main entrance." Both these statements are in English and Spanish.

He would inform passersby that the leaflet was the latest union news and they would take it or not. On at least one occasion, he passed a leaflet to an individual who was not an employee of Respondent.[32] Trudeau described the event as follows:

> Well, the one guy who sticks out in my mind is a guy who took it and then he wanted to stop and talk. And I — you know, there was several of us out there. And I wasn't sure if he was an acquaintance of somebody else, or whatever. And then he ended up getting a pile of leaflets and he started passing them out himself. I thought he was, you know, somebody else I hadn't met yet. It turns out he was a patient.

This patient did not indicate or say he was appalled or considered it inappropriate that Trudeau approached him with union leaflets. Trudeau surmised some of the individuals who accepted the proffered leaflets were probably patients. He did not have an individual refuse the proffer indicate any anger or sense they considered his leafletting in support of the Union organizing campaign inappropriate. When individuals refused the literature stating they were patients, Trudeau did not attempt to follow them or persuade them to accept the leaflet. This testimony fails to establish any handbilling described in this record by either employee or nonemployees, interferred with Respondent's provision of patient care or disturbed patients and visitors.

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32. Trudeau could not always tell if the passerby was an employee, visitor, or patient.

Appendix C

2. Interior

LPCH does not have visiting hours. Stanford Hospital tries to have visitors leave by 8 p.m. Also at night, Stanford Hospital limits access to the building to two entrances. Respondent admits there are a "large number of patients, staff and visitors entering Stanford Hospital" and it does not require people entering the facility to wear identifying badges or to sign in.[33] At night, LPCH can only be entered from one entrance and, as noted, earlier, displays a sign at this time requesting visitors to sign in at the visitors desk. Moreover, at the time of hearing, Respondent did not have sufficient staff to man the information desk and sign in visitors. The parties stipulated as follows concerning the sign in policy at LPCH:

> JUDGE WIEDER: Is there any dispute that individuals who are not in uniform without badges who enter through either the main entrance or any other entrance into Lucille Packard Hospital are

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33. Watkins testified:

> Q. And how about at Stanford Hospital and Clinics? Is there any attempt made to require people to register or sign in or check in in any way when they enter the building?
>
> A. No, there is not. At the main entries, no
>
> Q. Do you believe that you could reasonably have a check-in policy at Stanford Hospital and Clinic?
>
> A. No, I don't.

> requested for their business, what their business is, or requested to sign in or requested to somehow or other identify the purpose of their presence?
>
> MR. ARNOLD: There is a sign at the entrance to Lucille Packard Children's Hospital that says please do it, but it's not enforced in terms of no one sits there to make sure that people do.

Watkins testified the security staff tries to "identify people that don't really seem to fit in or don't have any legitimate business, at least on its face — on the face of what they're doing, and then make contact with those people to find out; as well as responding to calls from staff with the same kinds of information." The non-security staff of the hospital also has received instructions to stop and talk to visitors they think should not be in that area of the hospital. Outpatients who visit the clinics must have prior appointments. Respondent admits members of the public can enter the hallways and waiting areas of the clinics without appointments.

Over the years, Respondent's security staff has asked individuals to leave when they were being disruptive to patient care or the hospital's conducting its business, such as soliciting membership in organizations, and selling items such as encyclopedias and hospital scrubs. The security department maintains a record of the individuals it removes from Respondent's premises. According to Watkins, when Respondent asks individuals it considers are trespassing on its premises to leave, they request that individual to sign a statement admitting they were improperly on Respondent's property, that Respondent believes they are trespassing, and

admonishing them future infringements could result in prosecution. The explicit basis for the issuance of some of these statements was not established. Respondent admits the individual can refuse to sign the statements.

Respondent's security department also maintains a binder entitled "Bad Guys." Some examples of individuals contained in this book include: the "semi-stalker" of an employee whose clothes were dirty and he was unkempt; an apparently homeless person sleeping in a breezeway: another individual sleeping in a waiting area; a women sleeping on a bench in the Pharmacy wait area,[34] a person suspiciously pulling on car doors in a parking lot; a person trying to weigh herself in the Emergency Department; "a suspicious individual sitting at a table listening to static on the radio;" an unknown women asking to visit babies in the nursery who stated "that she had just lost a child and was there to — because she wanted to see the babies," she could not produce identification and refused to leave and the matter was handled by the police; and, a suspicious man."[35] Respondent had recorded 37

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34. According to Watkins:

> She stated that she had been discharged 6 days ago and had been sleeping all over he hospital ever since. She was unable to give cause why she should remain in the hospital and she was escorted to the Palo Alto train station.

35. This incident was described as follows:

> A suspicious Asian male. He was approached. It was determined he had no official business at the Medical

(Cont'd)

trespass events, but there was no dispositive demonstration these events were actually determined to be trespass under applicable laws. Respondent admitted on brief it "does not actively or generally exclude nonemployees, non-patients, or non-patient visitors from its premises." It claims, however, that most of the people coming to its premises are patients, employees, patient visitors, or others who come on business such as delivery persons or salespersons. Respondent did not present obective evidence to support this bare claim.

Stanford Hospital and LPCH have a ground floor plus three other floors. They each have a central atrium on the ground floor. The Stanford Hospital atrium has groupings of couches and benches for seating as well as a baby grand piano. The atrium was described as large. The atrium is open to the higher floors so the area containing the piano can be viewed from above. As discussed in greater detail below, concerts are given in this atrium area "[f]or patients and visitors that are in the hospital at the time." There is also seating around the atrium at LPCH. The atriums at both hospitals are locations where employees, "patients and their families and friends visit with each other. . . ." Employees are not prohibited from being at or in the areas around the atriums.

(Cont'd)

> Center. He was uncooperative and didn't give personal information, yet he was issued and signed a trespass agreement, then was escorted, once again, to the train station — not for the second time for him, but like the others to the train station.

Monroe testified:

> They're not supposed to sit in those couches because those couches are for patients and their families and visitors. If they had a family member there who was a patient, certainly they could go up during their break.
>
> Q. Is there a rule forbidding them from sitting in those couches?
>
> A. I don't believe it is stated. I don't think there's anything in writing, but I think most people know that that is for the patients and their visitors and families.[36]
>
> Q. Even if, as in the case when this photograph was taken, there are no patients and their families in that area?
>
> A. That's correct. They're not supposed to be sitting in those areas because those are for patients and their families.

Based on this testimony, I conclude Respondent does not have a rule clearly communicated to employees prohibiting them from sitting in the atriums. There is no evidence Respondent, by Monroe or otherwise, ever communicated to employees her understanding employees were not to be sitting in the atriums. The Bing music series

36. This testimony is another example of Monroe's propensity to engage in surmise. There was no evidence employees were instructed or otherwise informed they should not sit in this area.

is a regularly scheduled event at the Stanford Hospital atrium. The only other regularly scheduled event at the Stanford Hospital atrium is an "annual holiday tree-lighting ceremony where the Christmas tree is lit." There is no regularly scheduled musical events at the LPCH atrium.

There are areas opening up to the atrium on the upper floors which are accessed through doors which lead outside and look down on the LPCH atrium. Monroe does not consider these areas patient or family waiting areas. There are small triangular areas near the center overlooking the atrium in LPCH which are considered by Respondent to be patient and family waiting areas.

Stanford Hospital nursing units are distinguished by using a combination of the floor level and a letter, B through H. Some units are in the core of the hospital, and newer units are on three extensions called "pods", which are connected to the central hallway connecting Stanford Hospital and LPCH. In this decision, they are collectively referred to as the "units."

The main entrances to both hospitals are on the first floor, which admittedly have the heaviest foot traffic and most noise. The lobbies at the entrance of each hospital have seating areas. As found above, there is no check-in procedure clearly established for either Hospital. Ronald Ruggiero, the Union's organizing director, testified without contradiction that he first entered Stanford Hospital using the main entrance near the cafeteria, next to the Emergency Department and was not stopped from entering, asked to sign in, or asked the purpose of his visit. He was never asked to sign in upon

entering Stanford Hospital nor stopped by a guard asking the purpose of his visit regardless of the entrance he used.

Similarly, when Ruggiero visited LPCH, entering from the main entrance, he never signed in, he is not aware of any sign in sheet. Respondent has not proffered any such sign-in at either Hospital. Ruggiero was not stopped by anyone asking the nature of his business nor told, pursuant to LPCH's anti-abduction policies,[37] that he had to identify himself and state the nature of his business. Ruggiero visited LPCH between 50 to 100 times from the inception of the organizing drive to the date of his testimony. In addition to the lack of refutation, Ruggiero's testimony is credited based on the open and direct manner of his testimony. Moreover, he exhibited clear recall and appeared to be attempting to testify without device.

Ramirez has entered LPCH more than 40 times and has never been stopped by any representative of Respondent in the lobby or asked the nature of her business at the facility. She was never required to wear a badge. Barana first entered LPCH through Stanford Hospital; he also entered from through a back door to the hospital. He has entered through the main entrance more than 100 times. He was never asked to sign in, the nature of his business, stopped by a security guard, or otherwise limited in his access to the facility. Barana entered Stanford Hospital more than 50 times, and similarly was not asked to check in, sign in or identify himself.

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37. There was a question of whether Respondent had an antiabduction policy. Such a policy was never placed in evidence and its existence was never clearly established.

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Barana's testimony was not refuted. As previously found, his testimonoy is credited. Although demeanor alone warrants crediting Barana's testimony, I also note he exhibited good recall and was candid. For example, he readily admitted he could not recall the date he first entered LPCH.

The Hospitals have admitting departments adjacent to the main entrance waiting areas. There are main corridors running off the main lobby in each hospital which connect, among other things, clinic's, gift shops, cafeterias, coffee shops and newsstands. The Stanford Hospital main corridor separates the cafeteria from an outside area designated the Bing Garden and Patio, which is accessed through automatic doors. The Bing garden is in front of the Stanford Hospital cafeteria. It is uncontroverted the garden was "put in to prevent people from walking above the MRI.[38]" The garden is a raised platform and is designed to prevent people from walking over the magnet when it is in use. There are other garden areas between the pods of Stanford Hospital. The Bing garden is visible from the corridor. Respondent describes the gardens in a publication it produces to describe its art collection, as follows:

> From the inception, the gardens were intended to convey beauty, color and inspiration year-round. The seasonal gardens may be seen from many vantage points — from up close on the ground level to as high as the third floor. Patios, walkways and benches provide a convenient and intimate

38. MRI is an acronym for magnetic resonance imaging which ws a radiology imaging technique.

opportunity to experience the gardens: visitors[39] may chose to stroll, or simply to sit and enjoy the peaceful gardens.

Also near the Stanford Hospital cafeteria along this main corridor are automatic teller machines (ATMs) from Wells Fargo Bank and Stanford Credit Union. Individuals can use these machines for banking transaction and to buy stamps. There is no limit established on the record concerning who may use these ATMs. The machines are also close to the Emergency Department. There is no evidence these ATMs are advertised to the general public or otherwise outside Respondent's facilities. A Mrs. Fields cookie shop is across from the ATM's and near the Emergency Department in the Stanford Hospital cafeteria. There are several entrances to the Stanford Hospital cafeteria and outside seating. The LPCH cafeteria is on the ground floor and has an outside patio area where patrons can eat. One entrance to this cafeteria is across from the Radiology department.

In addition to the cafeterias in each hospital, Stanford Hospital has a separate dining room for doctors and executives of the hospital. The Stanford Hospital cafeteria, called Market Square Cafeteria, is open from 7 a.m. to 7 p.m. daily. A smaller area is kept open after 7 p.m. for the night staff. This cafeteria can seat about 300 people at a time and serves about 3000 to 4000 meals per day on average.

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39. Again, Respondent failed to define the term "visitor" or limit it to patients, employees, or their visitors. On the contrary, the general public is invited by this publication and others to visit the hospital for tours, programs, to see the art or to listen to the musical events, described in greater detail below.

Appendix C

The number of meals served on weekends is substantially lower than the on weekdays. The LPCH cafeteria is also open from 7 a.m. to 7 p.m. weekdays and from 7 a.m. to 3 p.m. on weekends. It can seat about 100 persons at a time, serving between 700 and 1100 meals daily. The cafeterias also cater certain events, usually meetings. The various attendees of these meetings were not described on this record.

The cafeterias are used by Respondent's employees, physicians, employees of Stanford Medical School, students of the school, patients, and visitors. Respondent participates in the Medical School's intern and residency program. The medical students, Medical School employees, interns and some of Respondent's employees are eligible to get a declining balance card from the Hospitals to use in the cafeterias.[40] Respondent admits these cafeterias are open to members of the public. Respondent admitted an individual coming to the Hospitals to have lunch would have a legitimate purpose to enter and make use of these facilities.

The declining balance card is one of two discounts offered by Respondent. "Those employees who choose to use the declining balance system will receive a ten-percent discount for using that. And that discount is not given to the residents. The residents' program is actually paid by the Medical School program itself, so there is no discount on that program." About 10% of the Stanford Hospital cafeteria's revenues are derived from the declining balance cards.

40. Respondent's witnesses did not know if any other students and employees of the University were eligible to purchase declining balance cards. The Standford Hospital is at least one-third of a mile from university schools other than the Medical School.

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In the general vicinity of the Hospitals there are several areas that have restaurants. The Stanford Barn has a restaurant called California Cafe and Stanford Shopping Center has several restaurants. The Medical School does not have a cafeteria, it only has a snack bar.

Near one entrance to the Stanford Hospital cafeteria are stacks of two free newspapers, the Palo Alto Daily and the Stanford Daily, as well as general circulation papers in vending machines such as the San Francisco Chronicle and the San Jose Mercury News. Newspapers are also sold in vending machines located on LPCH property. The cafeterias are not included in Respondent's solicitation/distribution ban, but portions of the hallways adjacent to them are, including the main hallway of Stanford Hospital which is adjacent to the cafeteria. General Counsel contends the inclusion of the hallways adjacent to the cafeterias is one reason Respondent's solicitation and distribution policy is overbroad, in violation of Section 8(a)(1) of the Act.

The LPCH cafeteria has a coffee facility called "Java Junction." There is no evidence Respondent advertises to the public or otherwise beyond its premises, its cafeterias, the Mrs. Fields or Java Junction. The lack of evidence concerning the cafeterias and other food outlets in the Hospitals and the lack of any evidence these facilities are advertised to the general public or even outside the Hospitals to special groups requires the conclusion the maintenance and operation of these facilities does not contribute to the establishment of a public forum.

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Food items are also sold at the gift shops located in the respective Hospitals. The gift shops are open until 9 p.m. The gift shops are staffed by the Respondent's volunteers as a means of raising money for Respondent. The gift shops also sell items such as magazines, books, gifts, toiletries, greeting cards, children's clothes, some adult clothes, jewelry, toys, Beanie Babies, and candy. The LPCH gift shop stocks more toys. As Respondent notes, the gift shops do not sell such general merchandise as tires, household goods, furniture or kitchen appliances. For the most recent annual accounting period, the Stanford Hospital gift shop had gross sales of $674,787.89 and the LPCH gift shop had gross sales of $322,257.24, resulting in respective profits of $211,276.91 and about $100000. These profits were donated to the hospital. There is no evidence the gift shops advertise outside the Hospitals.

Blood drives are conducted in the Stanford Hospital cafeteria annex about three times a year. The cafeteria annex is contiguous to the cafeteria. According to Respondent's counsel, since 1997, the blood drives are no longer sponsored by Respondent but by Stanford University Medical School's Blood Center, which is a separate corporate entity. The University gets permission from Respondent to conduct blood drives in the Stanford Hospital cafeteria. Blood is usually donated by appointment because the Blood Center personal take individuals with appointments before walk-ins. The appointments are made with a contact in Stanford Hospital. Prospective donors are required to complete a medical history card so a medical historian can screen the individual. The donor must also show a picture identification to permit the Blood Center to check their records prior to permitting the donation.

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These blood drives are only publicized in the Hospitals by use of notices on cafeteria tables, e-mail to employees, announcements over the hospitals public address system, placards on robots that roam the hospital corridors, and posters placed in the units. Approximately 100 people donate at each blood drive. Any member of the public is considered eligible to donate blood at these drives. There was no clear showing of how many people unaffiliated with the hospital participate in these drives. Inasmuch as the majority of the individuals donating blood have appointments and go through a screening, I find these blood drives are not a sufficient invitation to the public to come to the Hospitals to support a conclusion they are public forums.

The second and third floors of the Hospitals have waiting areas on both sides of the elevators. These wait areas are outside the units housing the patients, the nurses' stations and physician work rooms. Also within the units are day rooms, conference rooms and other areas where patients can visit with physicians, family and friends. The units are separated from these wait area by doors. In addition to the wait areas outside the unit doors at LPCH, there are four small triangular wait areas on each floor inset into the atrium side of the main hallway, which runs around the perimeter of the enclosed internal atrium.

3. Seminars and programs

LPCH has an auditorium on the first floor across from its atrium which is used for, among other things, community activities and events. Respondent's counsel represented "my understanding, Your Honor, is that programs that are made

available to the general public at the Stanford Hospital are funneled through the health library . . . that is the community outreach mechanism for Stanford University, rather than Stanford Hospital at UCSF Stanford." Moreover, Respondent's counsel represented:

> Now, there are also continuing medical education programs that are sponsored, both at Lucille Packard and at Stanford hospitals, both for the nursing staffs and for the medical staffs of those hospitals, as well as some that are open — a limited number of which are open to physicians and/or health care professionals, both in the local community and potentially on a national basis, given the connection to Stanford Medical School.

The LPCH Family Center sponsors community activities and events. One such event included the special appearance by gold medalist Jackie Joyner-Kersee. The event was called "Living With Asthma Fair For Kids". The purpose of the event was "to motivate children with asthma to exercise and participate in sports." The fair was held at the Cobb Track and Angell Field at the University. In addition to the special guest, the fair had activities for children, including races, face painting and asthma screening and information. Admission and participation were free.

LPCH also has a health van serving the community, a parent referral and information center and, community education seminars given by various experts to "demystify common childhood problems. . . ." The seminars are "open to the public and offer full audience participation. Seminars

are offered for a nominal fee and are held monthly." The location(s) of the seminars was not clearly established on the record. There is no evidence most of the seminars were held at a location other than LPCH. A brochure provided by Respondent's does not indicate it holds the seminars at locations other than LPCH. LPCH also operates a teenage health resource line and a program called Kid Call for children who are home alone. Moreover, LPCH operates and participates in a number of outreach clinics throughout California.

Stanford Hospital does not have an auditorium but does conduct community outreach programs and seminars. According to Monroe, these programs are not usually held at the hospital. One such program held at the hospital is the Perinatal Community Education Class. Respondent asserts this is a self-funding program conducted for marketing purposes. Respondent uses this and perhaps some if not all of its other programs to market its various services to the public. The perinatal program is advertised at doctors' offices as well as its health library.

Respondent conducts some of its community outreach programs at Fairchild Auditorium at Stanford Medical Center. Respondent also operates two branches of the Laverne Wilson Health Library. One branch is located in Stanford Hospital, and the main branch is located at the Stanford Shopping Center that is about one-quarter of a mile from the Hospitals. The branch in the hospital is small, about 250 square feet. As noted above, the shopping center is within walking distance of the Hospitals. Both branches of the library are open to the public. There are also affiliated branches not

operated by Respondent, including The Health Library of Avenidas and The Health Library at Peninsula Center for the Blind and Visually Impaired.

Respondent employs a Director of Community and Patient Relations, Jean Kennedy. Kennedy is in charge of the operation of the libraries. Respondent also maintains a virtual library on the "web." Kennedy testified the libraries were established to meet the "demand that patients and families have to have information about their medical diagnoses and treatments and their general health." The branch in the hospital is now operated by volunteers who posted the following missive on the door to the library:

> From the Volunteer staff at the Laverne Wilson Health Library.
>
> We try to maintain open hours of 11 a.m.-3 p.m. Monday through Friday. Unfortunately sometimes for reasons beyond our control we are not able to staff this library.
>
> We apologize for any inconvenience this my cause and invite you to call The Health Library at Stanford Shopping center. . . . We will be happy to send you the information you need.

The date the operation of the in-hospital branch became an all volunteer operation was not established on the record. Whether this branch had expanded operating hours on the dates of the incidents concerning the access of the Union's organizers to the property or at the time Respondent

promulgated the distribution and solicitation rule hereunder consideration, was not stated with specificity. Knight admitted the staff became all volunteer after two paid staff members left sometime in 1999, indicating the paid staff members were operating the library at the time the access and solicitation and distribution issues arose. There is no claim the main branch is operated solely by volunteers and therefore the solicitation and distribution rule would apply to those employees assigned to work at the main branch as well as those who worked at the Stanford Hospital branch.[41] I conclude the evidence of record fails to support a conclusion the library branch within Stanford Hospital is utilized by the general public or invites the general public to use its limited resources in a manner warranting the conclusion the maintenance of the library, co-joined with the other evidence of record, establishes Respondent maintains a public forum at the Hospitals.

Respondent's library maintains a mailing list of all its members. Membership is a fund raising device. Membership is open to the general public, not limited to patients and their families. Membership is not a condition precedent to access to any branch of the library. Respondent, by the library,

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41. Respondent maintains a use record of the in-hospital branch. I find this record has little if any probative value because it has no category for use by the general public. No volunteer or paid staff testified concerning how they maintained the record. This failure was unexplained. Therefore, there is no predicate to indicate members of the general public, if any, who used this branch, were ever included in the record, or if so, in what category. Thus, I conclude Respondent did not present an accurate record describing the use of this branch, such as category of user and frequency of use.

distributes brochures to those on the mailing list as well as distributing them at the various branches, including the affiliates. The library offers custom research packets for fees based on the depth of the research and extent of resources used. There is also a not-for-profit volunteer program that counsels seniors about their health insurance problems. These counseling sessions are by appointment only. There is no evidence such sessions are conducted at the branch located within Stanford Hospital.

The branch in the hospital does not carry general publication magazines like Time or newspapers. The library does sponsor community education forums. In 1998, it sponsored 39 forums. Attendance at these events varied from 30 to as many as 300 people. These events were not shown to have been held at Stanford Hospital. Knight surmised they were held "mostly on the Stanford University campus at Fairchild or we've had some at Kresky, and then we co-sponsor some that are held in other areas in down [sic] — you know, in other places outside of Stanford campus."

A calendar of events sponsored by the library is published by Respondent. The September 1999 calendar of events indicates Respondent has a Lane Community lecture series presented by Stanford's Clinical Cancer Center that included three lectures which were held at the Fairchild Auditorium at Stanford University Medical Center. There was no fee for the lectures and there is no indication attendance was restricted or otherwise not open to the general public. Advance registration was advised. A program on Estrogen Replacement was offered by Respondent and held at the

Health Library of the Aviedas. This program was free and open to the public. A program concerning medicare and HMO's for seniors was held at the main library at the shopping center. There was no fee but attendees were asked to register. This program also was not limited to a particular population.

The Stanford Center for Bioethics presented a lecture at the main library on doctor patient relations. This lecture was free and advanced registration was requested. The general public apparently could attend. Also listed on the calander was a presentation by the Palo Alto Medical Foundation on "Tips for Medication Management". Reservations were required and the seminar was held at PAMF Conference Center. The invitation to attend this seminar was not limited to or targeted at a specific group.

The calendar of events for October 1999 contains a free presentation of guided imagery entitled "stress busters for teens." Another guided imagery presentation was for general stress management and was also free. These guided imagery presentations were at the main library. A registration telephone number was provided but there was no clear statement registration was required for attendance. Other events announced in this calendar included a program on visualization and relaxation techniques for mothers and options for long term care for loved ones. These two programs were free and registration was not required. Registration was required for three programs: one concerning medications for pain; another about insomnia; and, the third regarding

sexuality as you age.[42] There was no fee mentioned for any of these programs but the last three did not contain the notation "No fee."

The November 1999 calendar of events included programs concerning diabetes, stress management, holiday stress, guided imagery for pain management, and perinatal programs. The stress management program had a $35 fee and was held at the SRI auditorium in Menlo Park, California. There was no evidence concerning the exact location of this site. There is no evidence Respondent or the University have a leasehold interest in this facility. The diabetes and holiday stress programs were also held at the PAMF conference center. The perinatal programs were at the LPCH auditorium. This Calendar listed several on-going programs, under the heading Health Improvement Program, including a program called "healthy living program" and a health and fitness assessment program. The healthy living program charges various fees, based on the topics covered. The assessment program charges a fee of $75.

Respondent describes its community education programs as a service to the community served by LPCH as well as promoting LPCH's specialty clinics. The communities listed as having been served by these LPCH programs resulting in successful promotion of its services include: Half Moon Bay, San Francisco, San Jose, Gilroy, Morgan Hill and neighboring

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42. This program as well as those on insomnia and medications for pain were held at the PAMF Conference Center which was not shown to be part of Respondent's or the University's property or leasehold. The other mentioned October programs were held at the main library.

communities. Respondent admits "[a]t least 30% of the attendees [to these LPCH programs] had no prior relationship with LPCH. Some of these LPCH seminars were: Tummy Troubles, Attention Deficit Hyperactivity Disorder, A Bug in the Ear (ear infections), New Baby, Johnny Can You Hear Me?, Fit on the Outside, Fragile on the Inside, and Lice, Ticks and Poison Oak. Respondent also conducts programs at local fourth and fifth grade classrooms in Santa Clara and San Mateo Counties about injury prevention. LPCH has engaged in other community outreach programs.

LPCH's office of Community and Physician Relations sponsors various health education seminars and continuing medical education programs. One or more of these programs, such as the annual "Pediatric Update," is marketed to physicians nationally. In 1998, the program had 160 registrants from 29 states and 3 foreign countries. Other programs are marketed to LPCH's referring physicians, which attracted between 10-30 participants. Another program on anesthesia was marketed to pediatricians in the Western States and attracted 100 registrants. The attendees pay for the programs, which Respondent intends as a marketing strategy to generate referrals. LPCH also sponsors about eight Pediatric Community Education seminars a year. These seminars are held in the auditorium on the first floor of the hospital. Usually, these seminars are held on weekdays from 7:30 p.m. to 9 p.m. The seminars charge $15 per couple for attendance.

The attendees of these various programs at the Hospitals were not shown to be of sufficient number, diversity and frequency to pernit a finding these activities, co-joined with the other factors discused herein, establish, or lead to establishing, Respondent maintains a public forum.

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4. Tours

Stanford Hospital invites the public to weekly tours. Stanford Hospital has a flyer which announces it offers weekly tours to the general public, staff and prospective patients at 10 a.m. Thursdays, beginning at the Information desk near the front entrance. These weekly tours are led by a docent and last about one and a half hours. Stanford Hospital also will arrange group tours at other unspecified times. The docents are volunteers.

According to Kennedy, in addition to the weekly public tours, Respondent conducted about 29 special tours for groups. She prepared a report which indicated for the reporting year 1998-1999, 163 people took the public tour. There was no record who these individuals were, whether they were patients, relatives or members of the general public unaffiliated with any hospital business. Kennedy described the special tours as: "[s]pecial tours are the tours for usually people that are visiting from foreign countries. Most of them are requested either by physicians or by the international medical services, so that's usually what they are." Kennedy admitted the individuals taking the special tours are not patients, their relatives or visitors employees or other staff members. Kennedy claimed the members of these special tours do not use the Respondent's cafeterias or gift shops. There are also student tours where an entire class visits the hospital. The students are usually young, such as second graders, but some high school groups also take special tours. Respondent also conducts orientation tours for new employees. During the latest reporting year, Respondent conducted 10 such tours. The special and childrens tours are conducted by prior arrangement.

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Tours are also conducted at LPCH only upon request not on a regular basis.[43] Such requests are received from visiting medical professionals and visiting administrative professionals. Frequently, the requests are from individuals affiliated with other children's hospitals because they are looking at reconstruction of their facility. Tour requests are also received from donors, elected officials, schools groups, and scout groups. Terri O'Grady, Director of Community and Physician Relations at LPCH, testified these tours occur, at most, once or twice per month. According to O'Grady:

> They [the tours by children groups] need to be prescheduled and be by appointment. It's really important that they are controlled and contained, especially where the children are — when children are involved in the tour. And we also need to do infection disease screening for people coming into the hospital.
>
> It's always been a policy of children's hospitals or any children's area I've ever worked in, because — especially immunosuppressed children can have very devastating and fatal effects from common childhood communicable diseases.

LPCH has a tour policy that offers to provide tours whenever possible with the caveat specific conditions are

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43. There is an exception to this policy. LPCH conducts weekly tours called perinatal tours. These tours are part of the "becoming parents" program. As noted above, Respondent has a perinatal educational series.

met.[44] Some of these conditions include LPCH community outreach will arrange all tours and will be notified of tours conducted by other approved tour leaders. These tours are typed as VIP, donor, general or group. The policy defines these tour types. The general tours are defined as "those for the general public. These are lead by trained docents on an as needed basis. Patient care units are not visited." Group tours are defined as "those for school and other organized groups." These tours must be arranged with sufficient advance notice, in writing, a minimum of one month prior to the tour date.

VIP tours are defined as those requested by Administration, the Board, medical staff, or those with special relationships with the hospital such as visitors from other hospitals, vendors, foreign guests of the medical center, etc. Donor tours are for those who are donors of Stanford Hospital, LPCH or the University and are led exclusively by the Lucille Packard Foundation for Children.

The tour policy limits the tours to particular routes with specific stops. The recommended tour size is 12 participants[45] plus the docent. Those tours permitted in patient care areas have a suggested limitation of 10 participants. Tours are to be scheduled to avoid lunchtime and staff shift changes. The tour leaders are required to observe infection control guidelines and tour participants must be asked germane

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44. The policy bears an original date of May 1992 and was revised May 1995 and April 1998.

45. Except school groups.

screening questions, such as whether they have been exposed to measle, chicken pox, or shingles.

Photography is generally limited and photographs of patients are prohibited. Tours including patient care area do not include the Comprehensive Pediatric Care Unit at any time and tours to the Oncology/Bone Marrow Transplant Unit are to be minimized. The tours to patient care areas are to enter and leave by the same hallway to minimize disruption. These tours are to consult with the charge nurse before entering patient rooms and are not to linger at the nursing station. The number of persons who attended these tours was not placed in evidence. The record fails to establish many members of the general public are attracted to the Hospitals to take these tours. Accordingly, I conclude the conducting of these tours, together with the other evidence of record, fails to establish Respondent is maintaining a public forum.

5. Art Tours.

Respondent advertises its art collection on its web site. The web site indicates the interior of Stanford Hospital contains a collection of about 500 original pieces of art and 1600 posters that are on display in the hallways, waiting rooms and offices. Kennedy testified there is also art work in patient rooms, rest rooms, back corridors, main public corridors, and the cafeteria. The art program started in 1982 to beautify the interior of the hospital for the benefit of staff, patients and their families and other visitors. Respondent conducts art tours. There is an Art Commission at Stanford Hospital. The members of the Commission are the principal donors of the art work. Kennedy, who is a member of the Art

Commission, estimates the posters cost, on average, $45 plus framing and the original art work has 5 to 15 pieces that could be valued at $5concerts000 or more.

According to Kennedy, the art program is:

> [D]eeply involved in getting art for the hospital, for the patient rooms and public areas, and in trying to get donations for that. Part of the art program, though, the art commission doesn't exactly sponsor it. Some of the people that donate money for it are the artists — art for healing, which is an artist that goes to the bedside and takes art materials to patients to work with.

And then we have slightly — the art commission has slightly extended its reach, because one of the members is the donor to the music program. So sometimes the art commission sort of considers that the music and gardens are under it because Mrs. Bing is on the art commission. So the strolling troubadour is sometimes considered by the art commission to be one of their activities.

There are a few individuals and groups who come to Stanford Hospital to take a tour of the art. Most of these tour participants are friends of members of the Art Commission. Kennedy or her assistant generally give the tour to these friends of the art commissioners. Kennedy recalled there were two such tours. Each tour had about 20 participants. There is also an audio tour. Kennedy claims: "It was intended for families. It's just of the art in the atrium and it's intended for

families while they're waiting and — waiting for patients to be operated on or anything like that, give them something to do."

Kennedy admitted if a member of the general public came to Stanford Hospital and asked to take the audio tour they would be given access to the tape and permitted to view the art work. A member of the general public who wanted to tour the art displayed in the hospital would not have to make advance arrangements for such a viewing. A member of the public could take a self-conducted tour without prior approval "by entering into the hospital and walking down the corridors."

In addition to Respondent's website, about six years ago its marketing department produced a glossy brochure describing and publicizing the art collection. The brochure is currently available at the hospital and is placed in family waiting areas. This brochure somewhat contradicts Kennedy's estimate that the art collection generally has a low monetary value. For example, the brochure describes the collection as follows:

> The first floor of the new wing features outstanding works of graphic art. A compilation of prints and monotypes created since 1967 by noted American artists Frank Lobdell and Nathan Oliveria constitute the display. . . . An acrylic by Norman Zammitt measuring 11 feet by 24 feet hangs prominently in the hospital's galleria.

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The second floor collection on the new wing comprises a variety of mediums: watercolors, oils, photographs, tapestries and collages. Artists of critical renown such as Josef Albers, Dan Flavin, Elizabeth Murray and Robert Doiseneau are showcased. Local artists as well as Stanford-trained artists are presented.

Part of the artwork is from the Bing collection that is comprised of 350 pieces in a variety of mediums, including watercolor, oil, photographs, monotypes, tapestries and collages. This collection "showcases artists such as Josef Albers, Dan Flavin and Ellsworth Kelly." The art works also include pieces loaned from the renowned Anderson collection and includes "70 outstanding works of graphic art and paintings." The Anderson's are "the owners of one of the largest private collections of 20th century art in the United States." The artists represented in the portion of the collection loaned to Respondent include Dan Francis, Frank Lobdell and Nathan Oliveira. While it appears the art collection contains significant pieces, it has not been established the collection draws significant numbers of individuals from the general public to visit Stanford Hospital to view the art.

The exhibits are only advertised on the website and in the brochure. There is no evidence these advertisements are widely read or that they attract a significant number of individuals whose purpose in visiting Stanford Hospital is to view the art-work. Respondent considers the individuals coming to the hospital to view the art as visitors permitted to use the parking facilities that do not require permits. This evidence fails to support a conclusion the art collection attracts significant numbers of the general population or is a

significant inducement for the general public to visit Respondent.

6. Concerts and strolling troubadour

At Stanford Hospital's atrium, Respondent holds at least twice weekly concerts. The musical events for the period August 29 through October 9, 1999 were held almost every Wednesday, Thursday and Friday as well as four concerts on Tuesdays. The concerts are held, according to Monroe, "[f]or patients and visitors that are in the hospital at the time. These concerts are not advertised[46] in the local media but

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46. Kennedy Testified:

> If any member of the public came, of course they could listen to the music.
>
> Q. Do you advertise these outside of the hospital at all?
>
> A. No. It might have been one time once when we advertised a large event, but its so long ago in the history I can't remember exactly whether we advertised it or not, but it didn't work.
>
> Q. The advertising?
>
> A. I can't remember whether somebody put a squib in a paper or we actually bought an ad, but we were so thrilled. We thought maybe somebody will come from the community and nobody came.

(Cont'd)

they are publicized by Respondent's Community Relations Department inside the hospital, using signs and notices. There is evidence they are also published on Respondent's website. The Wednesday concerts are held at 4: p.m. and the Friday concerts are held at 12:30 p.m. The performances last between forty-five minutes to an hour. It is difficult to determine attendance since people come and go to and from the atrium and some may listen from floors above which are open to the atrium.

Some of the musicians are singers, a harpist, a program about the myths of Australia's aboriginal people, including music made by a didgenidoo, unusual instruments from spoons to an Irish bagpipe, a storyteller, an original play by the San Jose Children's theater, a pianist, a flautist, chamber music, jazz groups, a barber shop quartet, reggae, calypso, madrigal singers, and rhythm and blues performers. There is no typical profile of the musicians, except usually there are small groups of musicians rather than orchestra size groups. Respondent has had "20 banjos playing in a banjo band and we've had rather large children's choruses come in to sing, things like that. We try to vary the music quite a bit, but mostly it would be smaller groups."

Another large event Respondent had in the atrium was a performance of The Nutcracker ballet. Kennedy did not think the event was a success because:

(Cont'd)

JUDGE WIEDER: Is it — Are they posted on the web site, the programs?

THE WITNESS: No, but that's a good idea.

A. I'm sorry, I meant that it wasn't a success in terms of getting people from the community to it. . . .

A. The one time that we tried, which was way back at the beginning.

Q. I see. And were you disappointed about that?

A. Yes.

Q. Why?

A. I guess because I love The Nutcracker and would like to see more people see it, but I wasn't disappointed in the sense that we didn't have a large audience, because we had a very large audience for that.

Who attended these concerts was not recorded or otherwise reliably chronicled. union organizers who were present in the hospital at the time of a concert went over to the atrium area and listened for awhile without incident. Respondent admits a member of the public coming to Stanford Hospital to attend one or more of the music series events is considered a "legitimate purpose" for being in the hospital. According to Kennedy, the performances are not well attended, she has observed just a few to as many as twenty people watching the event. "Then there is a surgery reception area that is directly above the atrium and that's usually fairly packed with people who hear the music. And I

wasn't counting them." The people she counted was not shown to include individuals on higher floors looking over the railing or sitting in wait areas within listening distance from the atrium. Therefore, her estimates are not considered to be reliable.

Concerts are also held at LPCH at an area called the Doobie Brothers Patio because the Doobie Brothers played there once. Concerts in this area can be heard in the main hallways on all levels but probably not in the patient units. Respondent also has "a strolling troubadour that goes out to the units." The troubadour is a Spanish guitar player. He goes into the patient units. He may also play in the public corridors of the hospital. These musical events have not been shown, alone or in concert with Respondent's other activities, to result in attendance by the general publc sufficient in number to permit the conclusion Respondent is maintaining a public forum.

7. Gift shops

Respondent has a gift shop in each hospital. The gift shop on the first floor of LPCH is just to the left of the main entrance to LPCH. In that area, there is seating but Dr. Hammer does not consider this to be a patient care area. Respondent has a book-mobile which volunteers take to patients rooms to see if they would like to read any of the available books. The volunteers also have a cart with various sundries and snacks from the gift shop that they take to patients rooms. While General Counsel and Charging Party tried to adduce evidence that these gift shops are analogous to shops in a shopping center, I find they do not advertise to

the general public or handle a sufficient variety of goods to warrant the conclusion they establish or add sufficient invitations to the general public to prove Respondent maintains a public forum.

E. Respondent's Solicitation Distribution Policy

Prior to September 21, Stanford Hospital did not have a solicitation and distribution policy. Monroe thought there may have been a policy concerning political activities. The substance of this political activities policy was not introduced into evidence.[47] Respondent was drafting a solicitation and distribution policy after the UCSF merger with Stanford Hospital and LPCH, but "it just never got finished."[48] The policy was drafted and distributed after the commencement of the union organizing drive.

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47. The basis given for its promulgation is that Federal and State laws governing not-for-profit organizations limit political activities on the premises. That is not the case with Union activities, which was one of the predicates advanced by Monroe in her letter for issuing the September 21 letter with the attached solicitation and distribution policy.

48. Monroe testified:

> Q. Shortly after the merger of Lucille Salter Packard Children's Hospital and Stanford University Hospital, did UCSF Stanford Health Care adopt a solicitation and distribution policy?
>
> A. Yes, they did.

(Cont'd)

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There is no evidence the policy was promulgated in response to or in consultation with any physicians. There is also no evidence or claim the policy was promulgated in response to patient complaints. As noted above, the parties

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(Cont'd)

> She then testified the old policy was the same as that attached to her September 21, letter. This claim does not explain her earlier testimony there was no policy at Stanford Hospital, that they never completed a policy. This inconsistency is another reason to not credit Monroe's testimony. Moreover, this testimony is contrary to the notation on the policy circulated with the September 21, letter to the effect it was revised on September 21. As noted above, the nature of such revision(s) was not placed into evidence. There is no evidence Respondent ever informed its employees of the existence of these policies prior to September 21. Accordingly, I find Respondent had not disseminated such a policy prior to September 21.
>
> Monroe then testified Respondent adopted a policy almost identical to the LPCH policy, stating "I think that, for some reason, in the original one — I'm trying to think — that you could not solicit or canvas in work areas, in addition to patient care areas." The bar against solicitation on working time was not in the LPCH policy. Again, copies of these policies were not placed into evidence, and Monroe indicated she was not sure of the exact provisions of any policy prior to September 21. Monroe claims she modified the Stanford Hospital policy to conform with that of LPCH. This uncertain, shifting testimony, without any copies of claimed prior policies, is not credited based on the reasons given above as well as its dubious and changing nature.

have stipulated Respondent has received few, if any, patient complaints referencing employee solicitation. There is no evidence any patient complained about employee's distributing flyers or other printed material.

On September 21, 1998, Respondent, by Monroe, distributed a letter to all employees concerning the solicitation and distribution of literature policy (policy). Monroe testified LPCH had a similar policy to the one she distributed to all employees prior to September 21. Respondent did not introduce this LPCH policy. The failure to place this solicitation/distribution policy into evidence was unexplained. Respondent also failed to establish that any such policy was distributed to the employees of LPCH. Respondent admitted it was not distributed to the employees of Stanford Hospital. The record further fails to demonstrate Respondent enforced such a policy at either of the Hospitals prior to September 21.

The September 21 policy applies to all manner of solicitation. The Respondent's September 21, letter provides:

> The current union organizing effort by some of our employees and SEIU Local 715 has resulted in an increase in solicitations and distributions of flyers and other papers. Because there has been some confusion regarding our policies and rules regarding such activities, this memo is intended to eliminate any confusion or misconceptions.

This statement indicates Respondent did not have a cogent, welll established and previously circulated solicitation

and distribution policy. Based on this admission as well as Respondent's failure to introduce any evidence of a prior policy, I find Respondent did not have such a policy applicable to the Hospital employees prior to September 21. The letter described the policy as follows:

> As far as solicitations and distributions of literature between employees, our policy prohibits such activities everywhere during working time — that includes the working time of the employee making the solicitation or distribution and working time of the employees to whom the solicitations or distributions are directed. "Working time" does not include breaks and meal periods. [Emphasis in original.]
>
> Our policy also prohibits solicitations and distributions of literature at any time in patient care areas. "Patient care areas" include patient rooms and immediately adjacent hall areas, treatment rooms and immediately adjacent hallways, patient waiting areas, patient admission areas, and lounges and other areas where patients visit with family and friends. [Emphasis added.]
>
> Solicitations are acts such as passing petitions around or asking people to sign up to join organizations or contribute money. Solicitation does not include general talk or conversation. However, we hope that you all recognize that discussions of unions, like politics and other topics that can excite emotions and heated views, should not occur around patients and their families.

> Finally, our policy prohibits distribution of literature at any time in work areas. Some examples of non-working areas include employee lounges or locker rooms, the cafeteria, parking lots and other outside areas.
>
> Of course, employees are prohibited from soliciting and distributing literature to nonemployees (patients, visitors, etc.) at any time on UCSF-Stanford property.

Attached to this letter was a copy of the full policy, dated November 24, 1997 and revised September 21, 1998.[49] The policy differs from Monroe's letter. For example, the policy declares:

> To avoid disrupting patient care and to prevent disturbing our patients and their families, UCSF Stanford Health Care prohibits employees from soliciting or canvassing on UCSF premises during work time, and soliciting or canvassing in patient care areas at any time. . . . Solicitation of or distribution of literature to nonemployees is prohibited at all times on UCSF Stanford property.
>
> Nonemployees are prohibited from entering UCSF Stanford health Care premises to solicit or to distribute literature of any kind. . . .

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49. Respondent did not clearly demonstrate this November 24, 1997 policy was implemented in either Stanford Hospital or LPCH prior to September 21. There is no claim or other evidence the 1997 policy was ever distributed to Respondent's employees or was other than a mere draft retained by management as a basis for its eventual development and implementation of a solicitation and distribution policy.

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> Patient Care Areas: Patient care areas include patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and their families or visitors, and the hallways immediately adjacent to all such areas.

The policy contains exceptions that are not pertinent to this proceeding. The policy has a slightly different definition of patient care areas and provides:

> To avoid disrupting patient care and to prevent disturbing our patients and their families, UCSF Stanford Health Care prohibits employees from soliciting or canvassing on UCSF premises during work time, and soliciting or canvassing in patient care areas at any time. . . . Solicitation of or distribution of literature to nonemployees is prohibited at all times on UCSF Stanford property.
>
> Nonemployees are prohibited from entering UCSF Stanford Health Care premises to solicit or to distribute literature of any kind. . . .
>
> Patient Care Areas: Patient care areas include patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and their families or visitors, and the hallways immediately adjacent to all such areas.

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Monroe defined patient care areas involving hallways as follows:

> Q. If the hallway is not immediately adjacent to those patient care or treatment areas or the family and patient waiting areas, may employees, otherwise consistent with the policy, solicit one another there?
>
> A. Yes, except for patient admissions area, which I don't think you mentioned.
>
> Q. Apart from the patient admission area or any hallway immediately adjacent thereto, if it's not in those areas, may they solicit one another?
>
> A. Yes, they may.

Monroe considers the following as non-working areas for the distribution of literature by employees: the main lobby of both hospitals, both cafeterias, employee locker or rest rooms, lunch rooms and outside the hospitals. She believes employees can solicit each other in these areas during non-work time.

Respondent monitors patient complaints, complements and other comments. Respondent produced 1200 written complaints concerning Stanford Hospital and 300 complaints concerning LPCH. Few if any of these complaints involved solicitation or distribution. Monroe made the bare claim the policy was revised and circulated with her letter "because there was quite a bit of solicitation, or complaints about

solicitation and passing out of literature on the premises." None of these complaints were claimed to have been in writing, none were introduced into evidence as the genesis of the September 21 letter or promulgation of revision of the rule. Respondent did not present any witness or other evidence concerning any complaints to Monroe or other managers about solcitation and/or distribution activities in the Hospitals.

While Respondent did provide then current complaints pursuant to subpoena, any verbal or other types of complaints as the predicate for the union reference in her letter or as the reason for the policy, were not specifically identified by Monroe. I find this bare claim to be without merit. Additionally, I have previously determined Monroe was not a credible witness. Buttressing this conclusion is the statement on the record of Respondent's Counsel, as follows:

> JUDGE WIEDER: There's no claim by Respondent that the policy was promulgated and implemented based on any complaints concerning solicitation.
>
> MR. ARNOLD: Correct. There's no testimony to even suggest that. . . .
>
> JUDGE WIEDER: And you admit that you have no evidence and you don't intend to adduce any evidence concerning the basis for the promulgation of the no-solicitation/no-distribution rule.

> MR. ARNOLD: Well, other than what's already been placed in the record on the promulgation, which was the adopted one — That was at Packard Children's — there is no evidence. I would agree, based upon my recollection, that there is no record of evidence that would suggest that we implemented — promulgated and implemented our rule based upon complaints contained in the documents turned over.

Respondent claims solicitation is allowed throughout the ground and first floors of Stanford Hospital and LPCH, except for the enclosed admitting areas and the abutting seating areas, and patient waiting areas, including a patient waiting area in LPCH next to the outpatient ancillary services area on the first floor. The ancillary services include laboratory tests and a pharmacy, which Respondent characterized as patient waiting areas. Distribution is permitted only in non-patient care, non-work areas during non-work time.

Peter Gregory, MD, an employee of the University is Senior Associate Dean of the Medical School and Chief Medical Officer for Stanford Hospital and Clinics. He testified he has not personally received complaints from patients about employee solicitation. He was not consulted about the contents of the letter or the policy. He read the policy just a few days before he testified.

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Dr. Gregory supported the solicitation distribution policy, even though he had not seen it until just prior to this proceeding, because:

> I think the best way I can answer that is to say that I think that any behavior that is not perceived directly pertinent to the healing process of recovery and getting those patients out of the hospital is distracting and unsettling, and sometimes upsetting. And it doesn't necessarily mean it's only solicitation. It could be employees talking about the baseball game.

Susan Flanagan. Respondent's Vice President for Patient Care Services for LPCH, also was not consulted about the letter or policy. Flanagan was not consulted prior to the issuance of the letter about any need to issue and circulate the letter and policy. She has received complaints from patients and their family members concerning the inattentiveness of the staff and assumed solicitation and distribution, even in waiting areas outside the patient care units, would be disturbing to the patients and their families. Flanagan admitted she never received a complaint concerning employees solicitation of one another. She admitted she assumed parents would be disturbed to observe solicitation and distribution in waiting areas outside patient care units.

Flanagan gave as examples of family complaints concerning patient care as follows:

> A. Call lights not being answered in what the family members perceive to be a reasonable time,

two employees talking together about something that families don't think is related to patient care of their child, laughing and talking in an area inside the nursing station.

Q. Have you ever received complaints that had to do with that kind of conduct in a patient waiting area?

A. Yes, I have.

Q. What was the nature of that complaint?

A. That was — Actually, it was two employees talking and eating lunch in a patient waiting area and the families perceived that it was infringing on their — what they considered to be family space.

Flanagan was of the opinion that families play a greater role in the pediatric setting compared to the adult patient setting, "because children are emotionally immature and they really are very dependent on their families to help support them during a hospitalization." Parents are not considered visitors by Flanagan. LPCH maintains a bed in the childrens rooms so that one parent can sleep in their room. There are no visiting hours at LPCH to facilitate family involvement regardless of the hour. The parents are faced with difficult situations and decisions. According to Flanagan:

There are many circumstances in the kind of hospital that we have where parents really have to be told about different choices that are available

> to them and make very difficult decisions about the future course of treatment for their child, whether it be what kind of chemotherapy regime the child might be placed on, whether to continue with life support or withdraw life support, very difficult decisions like that.

The families, in Flanagan's experience, focus on the care provided their child because they are often unfamiliar with the illness and treatments, so they concentrate on the area they understand. They are thus very observant of the health care provider's behavior. In Flanagan's view, LPCH must provide an atmosphere that is focused on the child's care, "one that's also nurturing and supportive and as free of distractions as possible." She admitted her testimony that parents would be disturbed if they saw one employee soliciting another was based on surmise, since she has never received a complaint from a family member concerning such solicitation.

Flanagan has received a compliant from a family that two employees were eating lunch and talking in an waiting area. She opined "the families perceived that it was infringing on their — what they considered to be family space." As a result of this complaint, the employees "were talked with." The incident occurred 7 or 8 years prior to Flanagan's testimony. The exact nature of this discussion was not placed in evidence. The incident occurred at another hospital, not Stanford Hospital or LPCH. The policies or practices at this other hospital were not placed in evidence. As noted below, employees are permitted to eat in the day rooms within the units at LPCH. Flanagan indicated that employees talking

about methods of improving patient care, which is the subject of two or more of the Union's flyers, may not be disturbing to the families of LPCH patients, depending on how the literature or discussion is phrased.

The types of areas provided for families in LPCH differ by unit. "In some units, especially the intensive care units, there are particular lounges or family waiting areas right inside the unit itself, and these are closed areas. And then in some of the other areas there are more open waiting areas out in the main corridor where there are clusters of chairs and there are family materials and family information."

There are two day rooms within patient care units at LPCH, "one on Three West and one on Two North." Employees are permitted to eat in the day rooms. According to Flanagan:

> A day room really was set up for really patients and families to go to get away from the room and to be in some place where they can watch TV, the families can do laundry in there, there's cooking facilities in there. . . . So the primary purpose is for patients and families.

Why this eating and conversing would be less disruptive than employees eating and engaging in general discussion in a waiting area outside the unit was not explained. Lawrence Hammer, MD, an associate professor of pediatrics employed by the Medical School and Medical Director for Ambulatory Care Services at LPCH, described the day rooms as follows:

> Those are rooms that are designed to provide a place for family members with the children to sit. I think they're equipped with a refrigerator, a microwave, a television. Some of us call them recreation rooms but they don't have pool tables and ping-pong tables, but they're lounges.

Dr. Hammer[50] also was not consulted about the contents of the letter or policy prior to their circulation and only saw the policy shortly prior to testifying in this proceeding. He has also received complaints from patients and their families concerning staff inattentiveness or lack of staff concern for a patient. He has received about six complaints with the last six months. None of these complaints involved employee solicitation or distribution. It is uncontroverted employees talk to one another in the day rooms when parents are present. Dr. Hammer testified:

> A. Well, I think there are too many situations where it's very easy, even on a patient care unit, to overhear employees engage in conversations about issues that have nothing to do with patient care, sometimes very loud conversations, not at all in the appropriate mood for that kind of a serious environment. And I mention that because they happen often enough that they'e quite noticeable.

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50. Dr. Hammer has been employed by Respondent or its predecessors since 1982. He has a practice in general pediatrics.

Q. Yet and still, the hospital doesn't have a rule that prohibits conversations amongst employees on the unit.

A. Not that I'm aware of.

Q. So that employees on the unit can talk about the football game last night, correct?

A. I'm not aware of a policy that says that they cannot talk about that, but I will tell you that if I'm on rounds and I can't hear what we're supposed to be talking about because conversations are going on ten feet away that are interfering with that. I will say something to the employees.

Dr. Hammer is of the view that parents play differing but important roles in the treatment of pediatric patients. For the younger patients, the parents possess the historical information concerning the child's illness. For young and older children, the parents are involved in their care and treatment. There are occasions when treatment decisions are made in consultation with the parents. He has observed this to be a very stressful period for the parents who rely on the physicians and other hospital personnel for information about their child's condition and treatment plan. The amount of time parents are at bedside varies, but it is rare that a parent is not present sometime during the day. It is his experience the parents "expectation is that the focus of everyone's attention will be on a healthy outcome for their child." Dr. Hammer meets with his patients' families in various

locations, including the child's room, and if that is not appropriate under the circumstances, outside the patient units in the waiting areas, specifically the triangular wait areas around the atrium.

An employee approaching a family member to distribute literature is inexcusable, according to Dr. Hammer, because: "[I]t's just common sense that an employee should not approach a family who is in the hospital for the care of their child for any purpose other than related directly to the care of the child." He based this opinion on an experience he had while in medical school in or around the 1970's at John Hopkins University where there was union activity. He has had no experience with such distribution at Respondent's hospitals. No patient or visitor has complained to him about being solicited on Respondent's property.

Dr. Hammer defines solicitation as a discussion between employees where the intent of one employee was to persuade the other. He conceded that if a family member merely saw employees talking without hearing the content of their conversation it would not have a negative impact upon the family member. No parent or visitor has ever complained to him about receiving literature on the outside of the hospital property.

The record clearly establishes Respondent does not have a policy forbidding conversations between employees other than solicitations. Additionally, Respondent does not prohibit employees from being in any waiting area during their breaks or meals. The record clearly establishes Respondent gave its managers anti-union campaign materials to distribute to

employees in the patient care areas. One such flyer discussed layoffs, employee benefits, healthcare cutbacks, and requests the employees vote no in the union election. Another flyer discusses strikes, what happens to wages and benefits in the event of a strike, replacement as an economic striker, the likelihood of the Union causing a strike, and requests the employees to vote no in the union election. There is no evidence the managers were specifically instructed or followed instructions to not distribute or post these flyers in the patient care units.

Linda Cornell received management flyers normally twice a week during the organizing drive in staff meetings. She saw one such flyer posted with the message "vote no." This flyer was taped above a sink in within a unit an area that patients have access to and could read the message. Fonseca saw management's anti-union literature posted "[a]t our staffing window, there's a large bulletin board in the hallway. And patients go down this hallway to nuclear med for their appointments." Jose Perez, received various anti-union literature from his manager and with his paycheck. He has seen these flyers posted on the main floor of Stanford Hospital adjacent to a window where patients go to pick up their x-rays.

Repetti received one such flyer in her mailbox and others on her computer in the form of e-mail. She has seen the messages from Respondent printed out from e-mail. She has seen these messages to staff concerning the Union organizing campaign inside her unit on the nursing counter which is accessible to patients and their families who approach or pass by the counter. Management conducted mandatory meetings

to discuss their opposition to unionization. Repetti has overheard employees discussing the content of these meetings while working on the unit. She has heard the staff discuss personal matters with families, including their wedding, and she discussed a surgery she had to help them go through the experience. There is no claim any of these conversations violated Respondent established policies and/or practices.

Dr. Hammer testified:[51]

> Q. And were you aware that UCSF Stanford management put out information to its employees regarding its position in that organizing drive?
>
> A. You never saw any of it.
>
> A. No.
>
> Q. Were you informed that such information was put out?
>
> A. Yes, I was. [Clears throat] Yes.
>
> Q. Do you think that it would be disturbing for patients and their families to see information

51. I note this and other testimony of Dr. Hammer, particularly on cross-examination, demonstrated a lack of candor. I also note his demeanor indicated he was crafting some of his answers to benefit Respondent's litigation theory. Therefore, his testimony is credited only where it is credibly corroborated or constitutes an admission against Respondent's interests.

laying around about the possibility of strikes at the hospital?

A. Yes, I do.

Karen Wayman, an employee of the University, Department of Pediatrics, is a research associate. Her job is bifurcated, one element is researching the "long-term developmental outcome of children with liver and kidney disease." The other aspect of her job is as the Director of the Family-Centered Care project. She is also a clinician, a developmental interventionist. She see's children and families on the liver transplant service daily. The project involves research, using parent focus groups, to gather information to improve patient care by creating a partnership between the patient, family, physician and other health care providers. She also meets one-on-one with some families. About 20 to 30 families participate in the monthly focus groups at one time. The families are asked questions such as "what is it about the care at the hospital that's not supportive? What are ways we can change the care? What's been traumatizing to you?" She and the other participating professionals then try to develop strategies to give improved support to the families of patients at LPCH. She is also comparing whether using the family center care program provides better outcomes than not using the family center.

Wayman admits their family center program is a research project where she is testing certain assumptions that is hoped will result in better outcomes. As the program continues, these assumptions could be modified, including the possibility the program would be discontinued if the assumptions do not prove valid.

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As a clinician, her duties include determining the child's developmental status and how the child's responding to the hospitalization. She also works with the family to assist them in negotiating their child's hospitalization. This assistance includes teaching parents to develop a partnership with health care providers, including how to ask questions. If they do not feel they are getting the support they need, she teaches them where to get such support. She also engages in such instruction with the focus groups.[52]

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52. Wayman stated the barriers to good communication between parents and staff are:

> Based on our focus groups as well as our contact with the families in the hospital, there's numerous barriers to good, equal partnership relationships between health care providers and families.
>
> Language is an important one, socioeconomic standing, the status of your child's health, the length of time you've been in the hospital. If you're usually — parents report, if you're in the hospital more than one week, their ability to cope is significantly decreased. In fact, that very senior parent mentor I talked about, who's a veteran of hospital visits, was rehospitalized with her child a few weeks ago. And after — during the second week, someone spoke to her abruptly, and she could no longer ask questions or advocate for her child till [sic] she was able to get some recovery. So, its a very, very difficult process. So, there are many barriers.
>
> So, a staff talking abruptly to you, a staff appearing too busy, not getting the information you need, not having social support.

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Concerning the alcove waiting areas outside the transplant unit at LPCH, Wayman testified:

> Q. Have you ever received any complaints from parents who were in this waiting area, either engaging in their recovery or talking with staff, that employees were passing through the waiting area and had disturbed them? Employees in the hallway.
>
> A. I've received general complaints about the lack of privacy in general in the hospital.
>
> Q. But I'm asking a specific question about this specific waiting and the specific hallway.
>
> A. It hasn't been specified in the complaint.
>
> Q. Have there ever been any complaints that have been relayed to you regarding conversations outside the triangle area amongst employees that disturbed the family members in the triangle?
>
> A. No. Not specifically.
>
> Q. And have there been any complaints about employees passing each other papers in the hallway while the parents were in a triangle area?
>
> A. Not specifically.

Q. And with respect to the waiting area, have there ever been any complaints or concerns raised by parents about employees passing each other papers in the hallway in the waiting area near 2285?

A. No.

Q. Do parents ever go downstairs in the atrium for recovery?

A. Yes, sometimes. It's not frequently used,[53]

Linda Repetti is a current employee of Respondent who testified pursuant to a subpoena. She works in the transplant unit of LPCH as a unit service assistant and has been employed by the Hospitals for 21 years. She works the day shift; her hours are 7 a.m. to 3 p.m. Her duty station is in the unit. She described her duties as follows:

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53. Wayman also opined, based on her experience, parents desire:

> Primarily access to good information and people telling them how to get that information. In the busy hospital, it's often difficult to find the person to get the information; support from parent mentors helping them advocate, privacy. Often, just as I said, you know, you're in for a lengthy period of time. Parents are requesting that they have more privacy, that people don't walk in the door without knocking, that they have time for release and recovery, quiet time, down time, psychological

(Cont'd)

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> Basically, we take care of the nursing unit. We process doctors' orders. We're right there directing families and patients to their rooms when they're first admitted. We implement the physicians' orders, schedule appointments, answer phones; generally take care of the function of the running of the unit.

Other employees who work full or part time in the unit include: the unit secretary, which is her position, registered

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(Cont'd)

> recovery. That health care providers approach them in terms of sharing information instead of telling them how the day's going to go.
>
> So, for instance, health care providers typically come in and tell them what the plan for the day will be. Were now changing health care provider behavior to come in and say, "What are your expectations for the day? How would you like to seethe day go?" and then coming up with a plan together. Those kind of strategies.
>
> In the hospital room, parents are often inundated with people. There's been several studies on the number of people who come into a hospital room, and it can be up to 44 in a day. They're inundated with information.
>
> They're required to make decisions, multiple decisions during the day. They need time where they can focus on themselves, to have some quiet time, time without interruption, time with other family members without interruption, and — where they're not affected by things going on in the hospital.

nurses, nursing assistants, and staff that comes to the unit as needed such as physical therapists, occupational therapists, dietary workers, transporters and other ancillary staff. Repetti estimates when she comes on duty in the morning there are about 20 employees present on the unit. The number of employees on the unit varies during the day. She has noticed employees talking to each other about matters not related to patient care, at times in front of patients or patient's families. She has never received a complaint from parents that she was talking about matters unrelated to patient care while she was at work.

Terri O'Grady is employed by Respondent as Director of Community and Physician Relations at LPCH. As part of her duties, she monitors patient complaints and comments. She also manages the family advisory council which is comprised primarily of about 10 parents of children who are frequent visitors to LPCH, and staff who meet monthly "to work on issues that parents have identified as problems or things that they want to do to improve care for the children or promote more of a family centered environment." She estimates she receives more than 2000 complaints annually. She did not claim any complaints arose because of employee solicitation or distribution.

Respondent claims it does discourage employees from talking too loudly, discussing confidential or inappropriately upsetting or controversial issues in the presence of patients or with patients. As previously noted, during the Union organizing campaign here under consideration, Respondent gave its managers flyers to distribute to its employees opposing unionization. These managers were not prohibited from distributing these materials in patient care areas.

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Flanagan opined employees engaging in solicitation of one another is no more disruptive to patient care than discussing political and other controversial matters. The families want the employees totally focused on patient care and have complained when they perceive employees do not have this singular direction.

Flanagan then testified conversely that she considered solicitation of any kind, for religious purposes or to sell cosmetics, etc. to be more disruptive than other types on conversations because: "I think the solicitation of whatever is much more active and it would be considered more negative." There was unrefuted testimony by Repetti,[54] who works in the transplant unit and was testifying pursuant to subpoena, that she has observed bake sales being conducted in the large waiting areas outside the units on the second and third floors of LPCH. She has brought goods to these bake sales and has observed parents of patients purchasing baked goods at these events. The tables for the sales were placed in close proximity to one of the triangular waiting areas around the atrium. She was not aware of any complaints by parents concerning these bake sales. She knows of at least ten bake sales since her employment at LPCH. The dates of these bake sales were not placed in evidence.

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54. Repetti works at LPCH. She defined her job as follows:

Basically, we take care of the nursing unit. We process doctors' orders. We're right there directing families and patients to their rooms when they're first admitted. We implement the physicians' orders, schedule appointments, answer phones, generally take care of the function of the running of the unit.

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Monroe testified:

> Q. Do you know whether, in fact, Lucille Packard's Children's Hospital has bake sales on its premises?
>
> A. I don't know right now. I assume they do not
>
> A. Short of sometime after the merger between Stanford and Lucille Packard and UCSF — it was after 11/1/97, I heard there were bake sales, and I had to send out a memo saying that we couldn't have them any longer at Packard.
>
> Q. And why was it that you couldn't have them any longer at Packard?
>
> A. Because a year or two prior to the merger, Stanford had been cited by the Health Department for having bake sales that were open to the public. And we were told that we could no longer have those.

Repetti has also observed craft sales at the Hospitals. They were held on the first floor of LPCH near the atrium. They could be observed from the upper floors. She has attended craft fairs and has observed both employees and patients' families attending these events. Monroe did not testify about these craft sales. Interestingly, there was no claim the bake sales disturbed or interferred with patient care, even though they were conducted at the outside waiting areas

on these floors. This testimony that the sole reason for terminating the bake sales was the citations by the Health Department undermines the testimony of Respondent's witnesses that patient care occurs in these waiting areas.

1. Waiting rooms

Respondent, on brief, defines patient waiting area as encompassing admitting and registration areas as well as those "seating areas that are used primarily for waiting and are clearly associated with nearby patient treatment areas." The admitting and registration areas are discussed separately below. Respondent also includes within the purview of its solicitation and distribution rule the numerous seating areas abutting the Hospitals corridors asserting patients often wait, frequently with their families, in these unenclosed or partially enclosed areas. Respondent did not detail any procedures being preformed in these unenclosed or partially enclosed seating areas abutting the corridors. Additionally, the Hospitals have waiting areas outside inpatient units that are not associated with registration or admitting areas. There are waiting and other non-treatment rooms inside the units.

Respondent admits it does not specifically prohibit employees from these waiting areas outside the units but expects the employees to not enter these areas except to clean or maintain them, escort a patient or visitor, or traverse them on their way to another location. Respondent asserts the intended use of these areas is for patients or visitors and employees do not know when these persons would want to use the waiting area.

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Dr. Gregory testified he included patient waiting rooms outside the units as a patient care area because:

> Well, I can speak both from a professional point of view and also from a patient point of view. As a patient point of view, that's when your apprehension builds the most. As a professional, I just notice that it's usually families in patient waiting areas, but it can be patients in clinics as well, things like that. They're either waiting for news, which they're often fearful is bad, or they're hearing news that they are concerned about.

So it's an area where patient care takes place, as far as I'm concerned.

He included family wait areas because: "I think the fundamental here is that patients and families assume that the people around them are there for one purpose only, and so any behavior — and I don't care what it is — that implies something different is disturbing, unsettling, and not conducive to what we are all about." The waiting areas he was referencing mainly concerned those located near the entrances into the main wards of Stanford Hospital. He observed these wait areas being used "it seems as sort of an escape valve. Families who are often overwhelmed by what's going on in the patient care area or need a breather from it, or patients who are well enough to walk out a little bit and get somewhere outside that intense patient care environment. And so I see — I think of them as a swing area in that — at that part of the hospital, and that's what they're used for." He has had occasion to talk with families in these

wait areas. He also has observed family members crying in these areas.

According to Dr. Gregory employees are appropriately in these areas to clean or help move the patients. Otherwise, he can think of no other work related reason for employees to be in these wait areas. He has observed employees in these areas, but "not often." He opined, if employees were using these area for solicitation or distribution, it would cause him concern:

> Because it would be potentially — Any occupant — How should I put it? If a family and a patient comes out of an area and is looking for a place to talk, they would be intimidated in some sense by any occupant of that room. They're looking for privacy. And so I would argue that that area should be kept private, just for that reason.

Dr. Gregory further testified, the fact Respondent has televisions and various magazines[55] and other reading material in some waiting rooms, does not create an atmosphere that would also permit solicitation and distribution because:

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55. Charging Party argues the magazines and newspapers cover Respondent's bond ratings, its hiring of management consultants, labor issues, and other issues which leads the community to perceive the Hospitals as a business, which lessens the claimed impact of union activity on hospital grounds.

> [T]he fact that the televisions are there and the magazines are there — that that's a distraction that is welcome. It is chosen distraction. They choose the distraction. They may choose not to read the magazine. They may choose not to watch the television.

They cannot choose not to observe someone who is talking about something entirely unrelated to their care standing nearby.

Dr. Gregory has observed employees soliciting each other. He considered these activities occurred in "perfectly reasonable area[s]." One occurred in the main hallway outside the cafeteria. Another occurred in a parking lot. He surmised if patients observed and heard this conversation:

> If we took a hundred patients, there might be nine or six who would not be disturbed about this and would say this is okay. But there would that — the majority, in my opinion, the large majority, in my opinion, would be concerned about the fact that there are people arguing, discussing things that are not relevant to what they're concerned about at that moment. . . .
>
> Q. Why is it that you think that if two employees were discussing their favorite flowers in the hearing area of a patient in the waiting area, are you saying that that conversation would cause the patient to feel that these employees are not focusing on their care?

A. I think it would — Yes, I do.

Q. Yet the hospital does not prohibit employees from discussing their favorite flowers while they're working.

A. As far as I know, they don't.

He has been told by a patient more than once, during his 30 years of experience, that they were concerned about a conversation they overheard between employees. He could not recall the exact number of times he had received such a complaint. Dr. Gregory admitted that some of the musical events held in the hospital may be disturbing to the patients. He also admitted a patient in a waiting area could observe employees engaged in the distribution of literature from one to another and not have their peace disturbed. There is no restriction against children in the Stanford Hospital wait areas. There is no restriction established on the record to food and beverages in these wait areas. Some patients play cards with their families in these areas. The hospital does not limit these activities as potentially distracting or otherwise deleterious to patients.

Drs. Gregory and Hammer have not performed any studies on the relationship between patient reaction or recovery and employee conversations. They have not seen any peer reviews on the subject. There is no limit on the nature or type of conversations that occur in the wait areas. Respondent also does not claim to censor any of the publications kept in the waiting areas or lounges based on their pictorial or verbal content.

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According to Dr. Gregory:

> Just generally, in talking to patients. They're often upset, concerned and irritated by the things that go on around them, not necessarily what's happened in the examining room; concerned about noise, concerned about parking, concerned about someone who doesn't look up from their desk when they come to the clinic desk, concerned about someone distracted by something else. That's where you get the complaints. It's not about the care.

There was no evidence Respondent addressed these concerns such as noise, distracted staff etc., in its other policies. In fact, employees are not restricted in the content of their conversations other than solicitations. Families and other visitors are not limited in the content of their conversations or activities. Children who are not patients are not prohibited from bringing toys to the waiting rooms. There is no limitation on the content of television shows, magazines and newspapers in these areas.

At LPCH, on the second and third floors, on either side of the elevators, there are two desks, a variety of chairs and racks containing some education material. This area on the second floor is close to the pediatric intensive care unit. Within this unit is a room called a parent waiting area. Also within the units are conference rooms which could be used for conferences with families of patients. There are also enclosed waiting rooms. Encircling the atrium are three triangular alcoves on the second and third floors of LPCH

which Flanagan considers patient or family waiting areas. Flanagan stated distribution and solicitation is banned in these triangular areas as well as the hallways immediately adjacent to these triangular areas.[56] Flanagan defined immediately adjacent to these areas as to the left and right of the entrances to the triangular areas and two to several yards down the corridor from these entrances. In the remainder of the corridor, as she understands the policy, solicitation and distribution is permitted.

Wayman testified the triangular alcoves, waiting rooms outside the family resource library, the family resource library, the playroom, the family lounge, and other places where there is no active health care going on, are the principal locations families go to get surcease from their child's illness and to reflect on treatment decisions. Some of the care decisions she is involved with include:

> Oh, it's a range of decisions from should we have a certain procedure or how should it go, to a case just the other day, when we were discussing, well — I was supposed to be here on Tuesday afternoon and I couldn't attend because we were working out with a family when to remove life support and when that might occur.

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56. Wayman testified social workers sometimes meet with families in waiting areas outside the transplant unit, but she did not know how often these meetings occurred in these areas. The waiting rooms near the elevators have parents, doctors, and staff passing by. There is no claim talking is restricted in these area or that discussions are limited to any particular subject matter other than solicitations.

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According to Wayman, the locations of the discussions concerning these care decisions varies. If the decision involves the removal of life support or whether their child should be selected for organ transplant, such discussions are held in enclosed rooms, including the playroom [playroom]. There is no evidence these discussions occur in the waiting rooms and hallways outside the units. If the discussion involves mediation between staff and the family, where the family has concerns about staff issues such as inattentiveness, or if the discussion involves the treatment plan for the day, then she and others will meet with the family in the triangular alcoves "if the room is not appropriate, the room of the child old enough to understand what we're talking about." The location of the discussion depends on the "sensitivity of the information," or whether the patient is in a single or double room.

Wayman has never received complaints concerning conversations between employees outside the triangular alcoves disturbing family members. She has never received complaints concerning employees passing papers between themselves in the hallways near the alcoves or other waiting areas outside the units on the second floor of LPCH. The increased communication Wayman referenced could include informing parents of the daily staffing changes and when staff members will be taking breaks so they would not be surprised if the staff member was absent or upset of they saw that staff member reading a newspaper.

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In the transplant unit on the second floor[57] is a day room.[58] According to Flanagan, the day room is designed for patients and their families as an escape from their room. The day room has a TV, laundry and cooking facilities, toys and games. There are also other wait areas within some of the second and third floor units. According to Dr. Hammer, the day rooms "are designed to provide a place for family members with the children to sit. I think they're equipped with a refrigerator, a microwave, a television." It is his view the support the families can provide their children in these rooms enhances their treatment and assists the healing process.

There are also a nurse work room and a physician work room within one or more of the units. These rooms, according to Dr. Hammer, are used for, among other things:

> [C]are conferences, where — in a situation where there's a complex medical issue, we will bring the parent or parents or other family members in with one or more physicians, social work[ers], any of the ancillary personnel that need to be there in order to have a general conversation about the child with multiple people involved. And that would be done behind a closed door.

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57. The second floor of LPCH houses a neonatal intensive care unit, a pediatric intensive care unit, the compromised host unit which contains primarily cardiology and renal patients. The third floor of LPCH has general pediatric patients, an oncology unit, and a general medical/surgical unit.

58. There is also a day room on the third floor.

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Flanagan described the following as patient care areas on the ground floor of LPCH: "a laboratory, some respiratory therapy, biomedical engineering and those types of services." She admitted patients would not typically be brought to respiratory therapy and only occasionally to the laboratory. After being shown Respondent's solicitation and distribution policy distributed September 19, Flanagan admitted there are no areas on the ground floor that meet the definition of patient care areas as defined in the policy. Therefore, as she understands the policy, employees could engage in solicitation and distribution on the ground floor of LPCH.

Flanagan portrayed the uses of the waiting rooms at LPCH as follows:

> Well, there's a variety of different uses. One might be that the parents for the longer-term patients might bring the child outside the unit into this area to get them outside of the patient care area, per se. Another area, and this is a very frequent use, is it's very stressful for the parents to be in the room with a sick child continuously, and so they would use this area to get some respite from the ongoing care or being in the room with the child.
>
> A third use of the space is for either physicians or other care providers to actually meet with a family or family members to discuss, you know, care regimes or different treatment alternatives with families. And a fourth use of the space would be for the families to come and think about these different options and that's oftentimes what they're doing is

> really, you know, evaluating the different options that have been made available to them and making decisions about future medical care for their child.

Flanagan believes it would be inappropriate to permit solicitation and distribution in the waiting rooms and areas because the families are distraught over the condition of their child, often the child is with them in these areas, the family uses these areas to discuss the different treatment options available, and at times they are crying. She opined the families have an expectation the hospital will be supportive of their needs, including protecting them from the intrusion of issues not involving the care of their child. Other than for cleaning, she could think of no legitimate reason for an employee to be in these waiting areas. She has never observed employees in these areas. She believes any employee use of these areas for solicitation or distribution, even when empty, would be inappropriate because a family could come to use them at any moment.

On cross-examination, Flanagan admitted the atmosphere in the waiting rooms and other areas outside the units is less intense than in the childrens' rooms and other areas inside the units. She also admitted families have a lower expectation of privacy in these outside the units waiting rooms than inside their child's room. Repetti has observed employees in the triangular waiting area and has never observed a supervisor inform an employee to leave the area. She has also observed a supervisor and another employee talking to each other in these waiting areas. She did not listen to their conversation.

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Dr. Hammer understood the triangular waiting areas are "intended primarily for family members to sit down outside of the child's hospital room where they can engage in conversation with one another or where they can conference with a physician or consultant." The basis for this understanding was not explicated on the record. He has met with families there. He has observed both families and small groups of employees in these areas. He does not consider employee use of these areas appropriate because of his belief they are "patient-care-related areas for family members or for family members engaged in discussion about their child's care. I don't consider them employee lounges."

There are several other waiting areas on the second and third floors of LPCH. Dr. Hammer does not think there are sufficient waiting areas on these floors because he has had occasions when it was very difficult to locate a place to meet with families. He did not detail how many times he experienced such difficulties. Dr. Hammer considers distribution and solicitation occurring in or near these waiting areas inappropriate because: "[F]irst of all, it would displace families from their appropriate use of those areas, and secondly, if families are in adjacent areas or in the hallways around those areas they would be within earshot of those conversations."

Dr. Hammer believes it is detrimental for patients and their families to hear employees discussing a baseball game in or near the waiting rooms because, "it is my opinion that families expect employees to be engaged in conversation and activity relating to their job and the provision of care to their children." As noted previously, Respondent does not ban such

conversations. These waiting areas are subject to distractions. As Dr. Hammer testified: "Kids run by and throw balls. I mean, it is a children's hospital. A lot of things go on there." Dr. Hammer admitted his opinions concerning patient and family reactions to employee solicitations and distributions was not based on any empirical research he or anyone else performed.

Repetti described an additional area used by employees and families of patients, an outside patio area accessed by doors from the second floor hallway that surrounds the alcoves. She has seen patients families in the waiting areas outside the units on the second floor. She has talked to other employees in the hallways near these waiting areas. She has passed a union flyer to another employee, a housekeeper, in this area, not someone who worked in her unit. She did not notice if there were patients in the nearby waiting room at the time she distributed the flyer. She has also distributed flyers to employees inside the unit, at the treatment room or office, which is not adjoining patient's rooms. Repetti and other employees, as well as patients and their families use the patio at the same time. Repetti has observed employees eating lunch on the patio. The employees talk to one another there and she has distributed informational flyers while out on the patio. She has never observed treatment occurring in this location. Respondent's witnesses did not testify about this outside area.

Repetti has seen children playing in the waiting rooms outside the units on the second floor of LPCH. She has also observed supervisors and other employees using the wait area near the elevators. She has never observed a supervisor

inform another employee that waiting area is for patients only. Repetti has solicited employees to sign union authorization cards. These conversations occurred in a normal tone of voice. She has received comments from parents about the Union organizing drive to the effect: "Yeah, you guys need it. Go for it. That's great.' Positive. I've experienced positive."

Linda Cornell, a unit secretary employed at Stanford Hospital for about 19 years, currently works on the third floor in a unit that treats neurology and short-stay patients. There is an enclosed waiting room about 25 to 30 feet from the unit. There are books and magazines in this room. She has observed employees using this waiting room on breaks and during lunch. A party was held in the room for Secretary's Day and Nurse Appreciation Week. Another party was held in the waiting room for the units "nursing assistants and SSAs in appreciation for them." The party was "set up" by management. Lunch was served in the room and there were gifts." Visitors to the unit would have to pass by this waiting room. When the door to the room is closed, the visitors can not see inside. The doors were not closed for the party. Cornell is not aware of any complaints concerning the party. She has had discussions with co-workers in this waiting room only "generally" when there were no patients or visitors present. Respondent failed to demonstrate these uses of this waiting room was consistnent with the limitations the witnesses claimed were required. Accordingly, this unrefuted testimony establishes some outside the units waiting areas are not immediate patient care areas.

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Cornell has observed employees talking to each other in the corridor across from this waiting room. She has spoken to other employees in this area and has passed a coworker a document there. When a family with children use this waiting room, she has observed the children running around and letting "off steam." On occasion, these children are patients on the unit. When children are somewhat rambunctious on the unit, she has had occasion to caution them. Cornell has asked coworkers to sign Union authorization cards. During these solicitations she conversed in a normal tone of voice. She has had discussions with co-workers about subjects not related to work when patients and/or visitors were present. She is not aware of any complaints concerning these discussions.

Also in Cornell's unit, there is an epilepsy day care room, which is usually reserved for epilepsy patients whose stay on the unit is quite lengthy, "they can go and wait in there. It's just a larger room for them." There is also within the unit a small conference room that is used occasionally for family meetings with clergymen or social workers. The conference room is small, quiet and private. This unit has a break room. Cornell usually has lunch in the break room. The break room is so situated that it is out of the normal path taken by patients when they walk within the unit.

Charles Fonseca, an 11-year employee of Stanford Hospital, is a crisis nursing assistant house-float. He is not assigned to a specific unit but goes where there is staffing shortage that needs to be filled on a temporary basis. He testified: "I float from floor to floor, wherever they need help. Say, one floor's getting a lot of admissions, I'll go help

them until things get settled." He identified a corridor and waiting area on the first floor between units B and C. He estimated, without refutation, that the corridor was about 10 feet wide. He has seen employees seated in this waiting area when patients were present and observed employees talking in this waiting room when patients were present. Fonseca works from 2:45 to 10:45 p.m. Visiting hours end at 8 p.m. There are not many visitors in Stanford Hospital after 8 p.m. There is no evidence patients or their families use these outside the units waiting areas after 8 p.m.

Fonseca testified the employee's breaks are staggered and he has found patients understand that employees get breaks and are not upset by this practice. He has spent breaks talking to patients. They talked about sports. He has watched baseball and football games with patients. He noted that at times he bonds with a patient and they talk about sports. Once during a discussion Fonseca was having with another employee on the first floor, a supervisor was present. The supervisor was an assistant nurse manager for a first floor unit. The supervisor compared the Union's organizing efforts to those of the union representing the nurses. At the time of the conversation there were people in hospital garb such as scrubs present as well as patients walking down the hall. Respondent does not claim to have a rule against such conversations. There was no claim such conversations were more or less disruptive than employee-to-employee solicitation and distribution.

He described the corridor adjoining this waiting area as "one of the main arteries" for the hospital, very near admissions and clinics. This corridor also can be used to enter

LPCH. Diagonally across from the waiting area is the Stanford Hospital gift shop. Another main hospital corridor serving the cafeteria and the rest of the hospital is close to this waiting room. These factors result in a lot of traffic passing by this waiting area. People talk to each other while passing this area which creates noise. Fonseca has sat in this waiting for a ride. There were no patients in the area at the time.

Fonseca has also used a second floor waiting area outside the units in Stanford Hospital to sit in while taking a break. There were no patients or visitors in the room at the time. Fonseca has worked on all the floors of Stanford Hospital and testified in a direct and convincing manner. Based on his demeanor his testimony is credited. He noted the configuration of the waiting areas differed slightly on the different floors of Stanford Hospital. On the second floor, in unit D, there is a counseling room which he has never seen an employee use for a break or lunch. He has distributed papers to other employees outside this unit several times when others, perhaps patients or visitors, were present. To his knowledge, no one complained about this activity. He was in uniform when he distributed the papers.

Also on the second floor, there is an E-pod or wing where Fonseca has worked. There are two waiting areas serving this pod which is near the intensive care unit. He has talked to co-workers between these two waiting areas. There is a counseling room serving this pod. He has talked to other employees outside one of these waiting rooms when the door was open and patients or visitors where in the room. There are magazines and newspapers in these waiting rooms.

One of them has a television set. He is not aware of any complaints concerning his talking with other employees outside these rooms.

Fonseca also worked on the F-unit on the second floor that is the post-partum unit. There is a waiting area outside this unit but Fonseca has not been in it. He has talked to other employees and distributed literature to other employees outside this waiting room. He does not believe there was anyone in the waiting room at the time of these events. He has observed, while patients were visiting with families in the second floor waiting rooms, that if the patient has an I-MED pump that delivers intravenous fluids which is on a battery that signals an alarm, a nurse going to the waiting room to restart the pump. He has also once observed a nurse bring a patient medications to a waiting room.

Fonseca has worked in the D unit on the third floor that he identified as "general surgery transplant." There are two waiting areas outside this unit. He has been in at least one of these rooms and has seen other employees in these rooms. He has spoken to other employees as he passed by these rooms. He has distributed literature on this floor near these waiting rooms as well as within a unit. There were individuals wearing street clothes as well as a patient present when he distributed the literature in the nearby corridor. He knows of no complaints pertaining to this activity.

The third floor E-Unit is "ear, nose and throat, and plastic surgery." Fonseca has worked in this unit which has two waiting rooms outside its doors. He has been inside these waiting rooms and has talked to employees inside and outside

of them. There were occasion(s) when other people in street clothes were inside the waiting rooms when he talked to coworkers. These individuals did not complain to him about his actions.

He has worked in the F unit on the third floor, which he described as "half of it's called the "Inn," which is a short stay, meaning less than 72 hours. And then they have an epilepsy unit on the latter half, the high numbers we call it, and post-stroke study." This unit has an outside waiting area. Fonseca has been in this room and spoken to other employees in the presence of individuals in street clothes. These individuals in street clothes did not complain to him about his talking to another employee in the waiting room. He has also talked to employees outside this room when others were inside the room, without complaint.

Fonseca has worked in the units on the ground floor of Stanford Hospital. Outside these units are waiting rooms that Fonseca has visited. He has spoken to other employees in one or more of these waiting rooms. He has also distributed literature to employees when he was in the waiting rooms on the ground floor. There were other people in the waiting rooms, some in hospital gowns and others in street clothes. None of these individuals complained to him about his conversations or distribution of literature. Also on the ground floor of Stanford Hospital are seating areas around the atrium. Fonseca has observed patients, visitors and employees going into the atrium. Employees talk to each other and distribute literature to each other when they are in the atrium. He has given another employee literature while in the atrium without comment from supervisors, patients or visitors.

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He has observed heated discussions among visitors occurring in waiting areas. When such events occur, the doors to the rooms are closed or the participants are moved to a more private area. He has also observed visitors bring and consume food in the waiting rooms. Fonseca had one discussion with a patient in the elevator about the Union organizing campaign. The patient observed his union button and "said, 'Oh. I heard about you guys.' And he came out and I said, Well, yeah. We're just organizing right now. We're trying to get a union.' And he said, 'Yeah. You guys really need one. You guys are really getting screwed.' And he said that he has some friends that also work, and that's how he's been hearing about what's been going on."

Jose Perez is employed by Respondent in the Radiology Department as Office Assistant III Clerk. His duties include picking-up and delivering x-rays to all departments of the Hospitals, including clinics located outside the Hospital grounds. His duties take him all around the hospitals, but principally Stanford Hospital. He has seen employees in uniform sitting in waiting areas, including the one at the entrance to radiology outpatient and the large waiting area near the admitting room. He has seen employees laying down sleeping in waiting rooms, including those near the atrium and admissions. There were patients and visitors in these waiting rooms at the time. He has also observed visitors sleeping in waiting areas. He has not heard of any complaints resulting from any of these uses of the waiting areas. He has also observed visitors playing cards and other games, conversing and consuming beverages in the waiting areas.

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Bernita McKee works for Respondent as a patient admitting representative in Stanford Hospital's emergency department. She described the emergency waiting room as having a television and magazines such as Good Housekeeping, Time and sports magazines. She has observed arguments occurring in the waiting room. One incident involved changing the channel on the television. Another occasion involved parents wanting the channel changed so their children would not have to watch a horror movie. The television is on most of the time. She has heard people in the hallway outside the room but could not hear clearly enough to discern their conversations. Her supervisor came to her work area and discussed the union with her. She does not know if any patient or visitor overheard this conversation but "it was right there where anybody could hear." Again, Respondent failed to demonstrate or claim this behavior by its supervisors was less disruptive to patient care than employee-to-employee solicitation or distribution yet it was not banned.

2. Hallways

Respondent's distribution and solicitation policy, as indicated above, also covers the numerous hallways that are immediately adjacent to the waiting, admitting and registration areas. The remaining hallways, Respondent claims, are not included in the policy. Respondent's witnesses gave various and differring definitions to the phrase in the policy "immediately adjacent."

Dr. Gregory would be concerned if employees were soliciting or distributing literature in a manner that could be

overheard or observed by patients for the same reason he is adverse to the employees use of the wait areas for these activities. Monroe admitted she did not mean to include entire hallways as part of the patient care areas defined in the policy. However, she also admitted she had not thought about the actual hallway areas included in the definition, such as areas around the doorway to the "LP Day Surgery Waiting area." Respondent, by Monroe or any other manager, has not met with any employees since September 21, to clarify the areas encompassed within the solicitation and distribution policy. Dr. Hammer did not have an opinion concerning patient and family expectations of staff behavior, including conversations, in Respondent's hallways.

As previously noted, Rapetti has observed bake sales occurring in the hallways outside the units on the second floor of LPCH, right next to the waiting area near the elevators. The table for the bake sale was about 5 feet from the triangular alcoves. She has brought items to the bake sales and observed parents purchasing baked goods at these sales. She has attended a few of these bake sales during her tenure with Respondent. Repetti has also observed the previously mentioned craft sales in the hallways. She has never heard of a family complaining about these events. Respondent has not claimed these events adversely impacted patient care.

Fonseca noted that there are periods during the day when there is a lot of activity in the hallways. These times include: the start of shifts, deliveries, the stocking of the service centers where supplies are kept, the carts making meal deliveries, and moving patients on gurneys for procedures

in other parts of the Stanford Hospital. He has observed an adult in street clothes playing catch with a small child in the hallway on the third floor outside the F unit about a month before his testimony. No one told them to stop playing catch. Perez has heard supervisors who were stopped and conversing in the hallways discussing matters that were not related to their work such as family matters. He has also heard such discussions near the gift shop where the subject matter involved collecting Beanie Babies.

3. Admitting and registration areas

Each hospital has a main admitting area near their main entrances. Some other registration areas are located at or near certain procedure areas such as radiation and therapy, and the outpatient ancillary services area at LPCH,[59] outpatient surgery, oncology day care, and the endoscopy procedure area. Respondent does not have an explicit policy barring employees from visiting or using these areas but Respondent argues its employees are not expected to be there except for cleaning or maintenance purposes, escorting patients or traversing them on their way to another location. This expectation, according to Respondent, is based on the fact it is impossible for employees to know in advance when patients or visitors want to use these areas. Respondent maintains visitors comforts and concerns are part of patient care. There is no evidence Respondent related this expectation to its employees.

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59. In this area patients register for laboratory test or have other outpatient treatment as well as pick up prescriptions.

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Dr. Gregory opined the admitting area of the main floor of Stanford Hospital should also be included within the purview of the prohibition because:

> Well, I just interpret patient care as anything involved in going through the difficult process of coming into a hospital, or to a clinic, for that matter. One of the specifics about this particular area, of course, is that they're often sensitive financial matters that are being discussed. And these, in particular, patients are concerned about being overheard or even interfering with their concentration on them.
>
> But this is just another area of patient care. They have to give sensitive information about their insurance, their home, their relatives, what they're there for, what's — coming in for. Feels like part of the process to me.

He believes patients are apprehensive from the time they enter the hospital until they leave it. In general, all of Respondent's witnesses testifying on the need for the solicitation and distribution rule is that patients and their families desire and need to believe the employees are focused solely on the patients' problems. Respondent did not explain why, under this thesis, all conversations not dealing with patient care are not prohibited from the same areas covered by the solicitation distribution policy. He does not consider asking patients being admitted to the hospital about their medical insurance to be patient care. He has heard patients complain about this question.

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Dr. Hammer believes it is inappropriate to permit distribution and solicitation in or near the LPCH admission area because it involves an activity not related to the care of the patient. Although, in his opinion, it is not a patient or treatment unit, he considers it a patient care area because:

> A. Well, the child is being admitted, the dealing with hospital personnel. There is time involved in the admission process. Any delay in the admission process or any increase in the duration of it would delay the child getting to the inpatient unit. So as far as I'm concerned, the child is already, if you will, in a patient care area. . . .[60]
>
> THE WITNESS: I was just going to add that occasionally, physicians will meet patients in this room, this waiting room adjacent to the registration desks in order to talk with families.
>
> Dr. Hammer does not meet many patients in the admissions area, about once a month. There was no evidence other physicians similarly meet patients in the admitting area of LPCH, or, if they do with what frequency.

Also on the first floor of LPCH, there is what is called a core registration area which is used principally for outpatient registration and registration can occur in the outpatient clinics. In the outpatient clinics, there are waiting rooms and

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60. Dr. Hammer does not consider questions about insurance to be part of patient care.

areas or counters where registration information can be taken if needed. Dr. Hammer admitted the hallway near the LPCH admitting room has substantial foot traffic. Dr. Hammer would not go to the lobby to have conferences with patient's families. He testified:

> Q. And wouldn't you agree that there's a different expectation with regard to patient care that a family has when they're sitting in their child's room, treatment room, the room where they're going to sleep at night, the room where they're waiting to see you than is the expectation they have when they're in the lobby area?
>
> A. Yes.

During the course of her duties[61] as well as when entering and exiting LPCH, Repetti has occasion to go to and pass by the registration area. She has never seen a doctor in that area or observed any patient care occurring in the admitting room. There is a television and magazines in the admitting room of LPCH. She has observed employees watching the television in the admitting room. She has observed employees talking to one another outside this admitting room. She has observed deliveries coming through the LPCH lobby, including UPS deliveries of office supplies to her unit flowers and pizza deliveries.

Repetti has observed children playing with toys as well as children crying in the admitting room. She described the

61. Repetti goes to the registration area of LPCH, on average twice a day to pick up patient related materials.

hallway outside the admitting room as "[A]ctive. It's hustling, bustling, and people are — it's not serene and quiet. It's going on. I mean there's a lot of stuff going on down there. People coming in and out, deliveries being made. There's stuff all the time." She opined that unless people in the hallway were yelling, an individual in the admitting room could not hear a conversation occurring in the hallway outside the admitting room. When she was in the admitting room and observed people in the hallway talking, she could not hear their conversation.

Perez described the admitting area of Stanford Hospital as crowded most of the time. There are individuals waiting, children playing and long lines at times at the nearby pharmacy and the front desk of the hospital. There is a pneumatic tube system in the hallway outside the admitting waiting room. It is used to send documents and specimens throughout the hospital. This system makes noise that can be heard in the hallway and in the ceiling all over the hospital, including in patients rooms. There is also a mail drop near the admitting area. Also on the first floor are little seating areas around the atrium as well as other waiting areas outside a laboratory. There is an area called Clinic F that has a toy train in the waiting area. There is another waiting area near the Auditorium in LPCH where Repetti has seen employees sitting. She has seen patients and their families as well as employees seated in the waiting area near the outpatient lab. She has seen books and magazines in this area. She has not observed any medical treatments occurring in this waiting area. Fonseca has spoken to other employees in the admitting area of Stanford Hospital.

Appendix C

Analysis and Conclusions

A. Respondent's Removal of Nonemployee Union Organizers from Areas Outside the Hospitals' Buildings

1. Respondent's property interests

State of California law must be applied to determine whether Respondent holds a sufficient property interest to lawfully bar or attempt to evict the union handbillers from the locations involved in this case. The Board held in *Bristol Farms, Inc.*, 311 NLRB 437 (1993):

> In considering the issues raised by this case, we bear in mind the following general principals. It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 of the Act.[62] See *Gainesville Mfg.*

62. The Board, in fn. 6 of this decision noted:

> Indeed, in *Lechmere (Lechmere, Inc. v. NLRB)*, 502 U.S. 527 (1992)), although the Supreme Court, reversing the Board, recently held that an employer lawfully barred union organizers from a shopping center parking lot owned by the employer, the Court did not grant certiorari to consider the Board's holding, confirmed by the court of appeals, *Lechmere, Inc. v NLRB*, 914 F.2d 313, 325 (1st Cir. 1990), that the same employer violated the Act by attempting to expel the organizers from public property adjoining the shopping center. On remand, the Board reaffirmed its finding of this particular unfair labor practice. *Lechmere, inc.*, 308 NLRB 1074 (1992).

Co., 271 NLRB 1186 (1984). Further, an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities.[63] See *Polly Drummond Thriftway*, 292 NLRB 331 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB 351 (1986), enfd mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3rd Cir. 1987).

. . . .

In the present case, the initial question is whether the Respondent possessed a property right that, without considering any possible Section 7 privilege that the union agents may have had, entitled the Respondent to exclude them from the sidewalk area in front of its store. If it did, the Respondent's conduct must be examined under case law applied when there are conflicting Section 7 and property rights. If it did not, however, this case presents no conflict between Section 7 and property rights, and the case law

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63. The Board observed in fn. 7:

This precept is not altered by the Supreme Court's decision in Lechmere. The employer there owned the shopping center parking lot from which it excluded the union organizers and it possessed a sufficient property interest to exclude individuals from the parking lot.

concerning such conflicting rights is not implicated.[64] See *Johnson & Hardin Co.*, (3[illegible] NLRB 690 (1991)].

To determine whether the Respondent has a property right entitling it to exclude the union agents from the sidewalk in front of its store, we must look to the law that created and defined the Respondent's property interest. It is well established that property rights generally are created by state, rather than Federal, law. As the Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions

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64. Fn. 8, of the *Bristol Farms* decision, like this case, remarked:

> There is no contention that the union agent's picketing and handbilling was not protected activity. We find it clearly protected under the second proviso to Sec. 8(b)(7)(C), which concerns picketing or other publicity for the purposes of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization. The right of union representatives to engage in this type of activity is well established. See *D'Alessandro's, Inc.*, 292 NLRB 81 (1988). (union agents' 8(b)(7)(C) proviso picketing and handbilling is concerted activity within "mutual aid or protection" language of Sec. 7); see generally *Longshoremen ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 202 (1970) (White J. concurring). *Gamer v. Teamsters Local 776*, 346 U.S. 485, 499-500 (1953) (state court injunction of nonemployees' organizational picketing found improper, freedom of unions to engage in picketing except where specifically prohibited by the Act found to serve the public interest).

are defined by existing rules or understandings that stem from an independent source such as state law. . . .

The Court reiterated a similar notion in *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 84 (1980):

> Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enable it to define "property' in the first instance.

Thus, the law of the State of California defines the extent of Respondent's property rights. The seminal case in California was *Robbins v. Pruneyard Shopping Center*, 153 Cal.Rptr. 854, 592 P.2d 341 (Cal. 1979), aff'd 447 U.S. 74 (1980). As noted above, Respondent has the burden of demonstrating it has sufficient property rights in the areas it excluded or attempted to exclude the union organizers from handbilling or meeting an employee or employees. Respondent has failed to clearly demonstrate it has such a property interest in these areas, with the exception of the bench in front of LPCH. The leases descriptions in metes and bounds were not translated by a surveyor or other competent professional, even though I requested such a clarification of Respondent's leasehold. See Generally *Doral Building Services*, 273 NLRB 454 (1984). For the purposes of this proceeding, the parties stipulated the bench in front of the main entrance to LPCH is within Respondent's leasehold. Thus, Respondent's eviction of Harland on or about September 5, will be considered under the *Pruneyard*, criteria.

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The Board, in *R & R Plaster & Drywall*, 330 NLRB No. 22 (1999), adopted the holding of *Indio Grocery Outlet*, 187 F.3d 1080, 1095 (9th Cir. 1999), cert. denied 29 U.S. 1098 (1999), as follows:

> [I]n cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property. [Emphasis in the original]

Respondent has failed to clearly demonstrate it has a sufficient property interest in the area near the bus stop and the area near the parking lot to permit a claim of right of removal. Expertise of a nature not provided in this proceeding was needed to accurately translate the metes and bounds descriptions in the leases. Survey maps coinciding with the metes and bounds descriptions were not provided. Respondent has failed to provide clear and convincing evidence it was "in possession and control for trespass purposes." *Hader v Co-play Cement Mfg. Co.*, 410 Pa. 139, 189 A.2d 271 (1963), followed by the Board in *R & R Plaster & Drywall*, supra. Since the Ramirez incidents occurred at or near a public bus stop as well as University run shuttle stop, there is a possibility she was on a public sidewalk or property owned by the University and not within Respondent's leaseholds.

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Respondent has failed to demonstrate the Ramirez incidents as well as the November 2 or 3 incident where Respondent attempted to remove Harland, Barana and Hooper occurred within Respondent's leasehold. Even on brief, Respondent does not aver the descriptions in the leases establish its leaseholds encompass the locations where its guards removed or attempted to evict Ramirez, Harland, Barana and Hooper. Watkins admitted he was speculating about Respondent's leasehold parameters and that Respondent's maintenance obligations exceed its leaseholds. Monroe limited Respondent's leasehold interests to approximately 10 feet from the buildings. The evidence demonstrates the Ramirez and November 2 or November 3 incident involving Harland, Barana and Hooper, occurred at points further than 10 feet from the buildings. Respondent has failed to clearly demonstrate Stanford University or any other property owner, gave Respondent a property interest in these areas. As found above, there is no question but that the activities of Ramirez, Harland, Barana and Hooper were protected under Section 7 of the Act. There is also no question Respondent's guards were acting as its agents at these times.

Additionally, Respondent did not present evidence on this record of the nature of its relationship with the University. Thus, if the November 2-3 events with Harland, Barana and Hooper and the three incidents with Ramirez occurred on University property, there is no evidence Respondent was empowered by the University to expel nonemployee union organizers who were peacefully handbilling or waiting for employees on University property. The University provides the Union with an office on its property and issues union organizers who are not employees of the University or

Hospitals, parking permits. The evidence indicates the University permits nonemployee union organizers to engage in protected concerted activity on its property.

Accordingly, I find Respondent has violated Section 8(a)(1) of the Act by ordering nonemployee union organizers from the sidewalks near the garage and near the bus/shuttle stop, property in which it failed to demonstrate it retained a sufficient property interest to permit these actions. Respondent has failed to demonstrate Stanford University or other appropriate entity delegated to Respondent its property interest in these areas for any purpose. The failure of the police to find trespass and the failure of Respondent to obtain trespass warrants for their arrest is further indication that Respondent did not have the right to remove these nonemployee union organizers.

2. Assuming Respondent has a property interest, could it lawfully exclude nonemployee handbillers

Assuming arguendo that all the incidents occurred within Respondent's leasehold, it must be determined whether Respondent's leasehold is a public forum under California law, as General Counsel and Charging Party argue, or whether the nonemployee union organizers were trespassing on Respondent's property. If they were trespassing, was their removal discriminatory? Were Respondent's new restriction reasonable as to time, place and manner? Was the Union permitted under the Moscone Act to trespass with impunity?

While many of the access cases involve shopping centers, the California decisions also consider handbilling, picketing

and other organized activities at banks, abortion clinics, a medical center, a university, a Federal government laboratory, and apartment complexes. *Pruneyard*, involved a suit brought against private owners of a shopping center to enjoin them from denying students from soliciting signatures for a petition to the government. The *Pruneyard* court found the California State constitution afforded greater free speech rights than the United States Constitution which subordinates constitutional guarantees attaching to private property, particularly where the interests of the private property owner conflict with the general welfare. This finding was affirmed under the supremacy clause of the United States constitution in *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980). In *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal.3d 392 at 403, 128 Cal.Rptr. 183 at p. 190, (1976) the California court concluded that private property rights may be restricted and subordinated to the public interest in collective bargaining. Quoting *Miller v. Board of Public Works*, 195 Cal. 477, 488, 234 P. 381 (1925).

The *Pruneyard* California Court, found the growing significance of suburban shopping malls rendered them akin to downtown shopping centers that had traditionally been the situs of protected free speech, ie. a public forum. The Court noted,

> By no means do we imply that those who wish to disseminate ideas have free rein. We noted above Chief Justice Traynor's endorsement of time, place, and manner rules. (*In re Hoffman*, supra, 67 Cal.2d at pp. 852-853, 64 Cal. Rptr. 97, 434 P.2d 353) Further, as Justice Mosk stated in

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> [his dissent in] *Diamond II* [11 Cal.3d at p. 342, 113 Cal. Rptr at p. 476, 521 P.2d at p. 478], "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the shopping center there). A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see Diamond (I) 3 Cal.3d at p. 665, 91 Cal. Rptr. at p. 478, 521 P.2d at p. 470 (dis. opn. of Mosk, J.).)

Respondent argues its Hospitals are like a modest retail establishment rather than a large shopping center such as that in *Pruneyard*. General Counsel and Charging Party argue Respondent's invitations to the general public through its art and music programs, lecture and other series, cafeteria's and other food service providers, blood drives, library on site, and other actions to attract the public at large to its facilities render the Hospitals public forums.

I do not find this argument persuasive. General Counsel and Charging Party have failed to demonstrate the Hospitals were akin to a "miniature downtown." *Pruneyard*, supra at 910 fn 5. Moreover, it has not been demonstrated that the

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Hospitals are locations "where people mingle freely and gather to exchange viewpoints on public questions, and second, that it is an end destination in itself and the people in it are not on their way to any place else." *U.C. Nuclear Weapons Labs Conversion Project, et. al. v. Lawrence Livermore Laboratory, et al.*, 154 Cal.App. 3d 1157, 1162 (1984). In the Lawrence Livermore Laboratory, decision, the issue was weather a visitors center operated by the Federal Government is akin to a public street or park. The court held the concept of "public forum . . . is a continuum, with public streets and parks at one end and government institutions like hospitals and prisons at the other." (Citations omitted.)

The Hospitals are not analogous to public property. They do not invite the general public, only individuals seeking medical care at their facilities and their visitors and/or care givers. There is no basis to conclude the Hospitals are public forums, i.e., public property or an evolution to a place similar to public property like a large shopping mall that invites the public to come for a broad spectrum of activities. The areas where the public is given access in the Hospitals are not advertised broadly. Parking lots have signs designating their use for patients and visitors. While visitors could be construed to mean the public in general, Respondent's cafeterias, other food services, and gift shops are not advertised to the general public. The number of visitors to the art collection, hospital tours, concerts and other activities such as seminars, have not been demonstrated to be analogous in numbers or otherwise, to those visiting a large shopping mall, public park, or central downtown area where the general public is invited to gather.

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Federal and State regulations require Respondent to provide health care to the public. The intended purpose of these regulations is the availability of health care, not public places to congregate for all manner of purpose. In *Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties*, 14 Cal.App. 4th 162, 175 (1993), the court held: "Private medical facilities not devoted to general public use are under no constitutional burden to guarantee individuals access for the purpose of physical or verbal expression. (*Planned Parenthood v. Wilson*, 234 Cal. App.3d 1662, 1674 (1991). The exercise of the right to free speech at private abortion clinics is appropriate only "within the traditional public forum of the public sidewalk."' (Ibid). Charging party distinguishes the medical office building cases from the instant proceeding because they did not involve union activity.

While in the instant case, unlike *Planned Parenthood v. Wilson*, Id. there was no impeding or obstructing access of Respondent's clients to its facilities, nor is the volatile issue of abortion involved, there was no demonstration the leafletting here under consideration occurred on public property. There was no demonstration that the Hospitals allow other leafletters to operate on its property. Indeed, it could be argued Respondent has a legitimate interest in preventing disruptions on its property. But, as held in *Widmar v. Vincent*, 454 U.S. 263, 270 (1981), involving a college, citing *Healy v. James*, 408 U.S. 169, 184 (1972): "While a college has a legitimate interest in preventing disruption on campus, which . . . may justify such restraint, a "heavy burden' rests on the college to demonstrate the appropriateness of that action."

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In this case, the handbillers were acting peacefully, without any claim of disruption or impeding any activity of the Hospitals. Respondent failed to justify the change in its rules when it banned distribution by nonemployees before 7 a.m. and after 8 p.m. There was no evidence of any disturbance or other incident requiring the new ban. Accordingly, I conclude Respondent has failed to demonstrate the new policy was the implementation of reasonable time, place and manner restrictions. The time restrictions appear to have limited access by the Union to two shifts of Respondent's employees without any demonstration of reasonableness. Respondent adduced no evidence concerning how these restrictions served its legitimate interests.

There is no evidence the Union's nonemployee organizers routine handbilling at these locations impeded Respondent's provision of service to patients and their visitors. There were no demonstrable complaints from patients or visitors concerning handbilling outside the 7 a.m. to 8 p.m. time period. Respondent's bare assertion there were complaints, has not been credited. There is no evidence these routine and regular handbilling activities caused any complaint at any time sufficient to warrant as reasonable its the imposition of time, place or manner restrictions. The areas where these activities occurred were open to the public to ride buses, use the sidewalks to enter Respondent's as well as the University's buildings and to access University and public transportation. Individuals waited in their vehicles near these sites for employees. All these activities were permitted by Respondent after the policy change.

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Respondent did not limit the hours of deliveries, such as food supplies. Respondent limited only Union activity by time and place restrictions. These permitted activities were not shown or claimed to be less disruptive than the handbilling permitted. The handbilling and other banned activities of the nonemployee union organizers before 7 a.m. and after 8 p.m. were not shown to be disruptive or in any way or impeded Respondent's mission of providing patient care. The Respondent has failed to demonstrate it has narrowly tailored its time, place and manner restrictions for legitimate reasons. See *Grayned v. City of Rockford*, 408 U.S. 104 (1974); *H-CHH Associates v. Citizens for Representative Government*, 238 Cal. Rptr. 841, 854 (Cal. App. 2 Dist. 1987), cert. denied 485 U.S. 971 (1988). Therefore, this record requires the determination Respondent failed to demonstrate its November 2, time, place and manner restrictions were reasonable or that the handbilling was incompatable with the usual activities at the involved locations.

The Hospitals' interests as a non-public forum must be weighed against the interests of the union organizers. As the court held in *U.C. Nuclear Weapons Labs Conversion Project, et. al. v. Lawrence Livermore Laboratory, et al.*, supra at 1164 citing *Perry Educ. Assn. v. Perry Local Educator Assn.*, 460 U.S. 37, 103 S.Ct. 948, 957 (1983):

> This last category is a "nonpublic forum." The court said that in such a place "distinctions in access on the basis of subject matter and speaker identity . . . are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the

> property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."

The issue then is whether the nonemployee organizers were engaged in expressions that are basically incompatible with Respondent's normal activity at the times and places here involved and whether Respondent's property interests entitle it to exclude union organizers from its property? General Counsel and Charging Party, relying on *In Re Lane*, 71 Cal. 2d 872, 878 (1969), argue that a business that "invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public," may not rely upon private ownership of the sidewalk to strip the public of its right to engage in free speech activity on the sidewalk. This holding has been applied by the Board to a grocery store in finding a violation of the Act to prevent union organizers from leafletting on the sidewalk in front of the store. *Indio Grocery Outlet*, 323 NLRB 1138 (1997), enfd. sub. nom *NLRB v. Calkins*, 187 F.3d 1138 (1999).

Respondent claims the sidewalks were not public areas thus it could legally bar or limit handbilling. The State of California has allowed union picketing on private property. In *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 25 Cal.3d 317 (1979), the court held:

> In summary, the decisions of the United States Supreme Court and of this court recognize that the State of California, by statute or by judicial decision, may permit union activity on private premises. Our earlier decisions in *Schwartz-*

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Torrance Investment Corp. v. Bakery & Confectionery Workers Union, 61 Cal. 2d 766 (1964) and Lane, — rulings which have not been overruled or eroded in later cases — established the legality of union picketing on private sidewalks outside a store as a matter of state labor law.

Charging Party maintains that this rule should apply to handbilling with even greater force than picketing because handbilling is "pure speech" while picketing is "a mixture of conduct and communication." *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Construction Trades Council*, 485 U.S. 568, 580 (1988). This issue has admittedly not been considered by the California courts. However, Charging Party avers there is no reason to believe the California courts intended to carve out an exception to the Lane holding for hospitals. Particularly, the Union argues, where hospitals are increasingly acting like other employers and businesses and "a full-service hospital is closely analogous to a supermarket in that it provides an essential service, and it is fully open to the entire community." I find this argument takes the concept of businesses that invite the general public like a shopping mall as similar to the Hospitals to far. These Hospitals are not areas of general entertainment and shopping as the meager attendance at its tours, programs and usage of its cafeterias and gift shops illustrate.

In sum, while I have found the handbilling incidents were not shown to have occurred clearly within Respondent's leasehold or agency for purposes of enforcing trespass prevention rights, if such property interests are found, I

conclude General Counsel and Charging Party have failed to demonstrate Respondent's facilities are public forums within the meaning of *Pruneyard*. The gift shops and cafeteria's maintained by Respondent are not publicized to the general public by advertising to the surrounding communities. While Respondent failed to enforce its sign in requirements and granted access to the public for art tours, musical events, general tours of its facilities and programs and seminars, the attendance at such events almost all the time was less than 100 persons. Based on the evidence of record, I conclude Respondent is not a public forum as defined in *Pruneyard*, and its progeny. However. I further find Respondent has failed to demonstrate its time, place and manner restrictions were reasonable under the presented circiumstances of peaceful, not disruptive handbilling or quiesent waiting for employees at a location others tranditionally waited for rides and to meet employees. Respondent has not presented any evidence these activities disrupted or otherwise impeded any normal activity in these areas. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1974).

3. Did Respondent discriminatorily or otherwise improperly enforce its access rule against Harland

The evidence clearly demonstrated that Respondent's agent removed Harland from a bench in front of LPCH when he was merely sitting awaiting an employee and they would leave the premises together in the employee's relatives vehicle. He was not engaged in any leafletting or solicitation of employees. The bench is admittedly on Respondent's property. Charging Party argues this was disparate treatment of an union organizer

contrary to the requirements of *Lechmere*, supra, 502 U.S. 527.[65] General Counsel argues Harland's eviction was improper under the applicable California law. See also *Babcock & Wilcox*, 351 U.S. 105 at 112 (1956). Under this exception, an employer may be found to have engaged in discrimination under Section 8(a)(1) if it denies union access to its property while allowing comparable activities by other nonemployee entities."

Charging Party argues that by removing Harland from the bench, Respondent discriminated against the Union because it did not demonstrate that it evicted other nonemployees from the benches in front of LPCH, citing *Nick's*, 326 NLRB 997, 1000 (1998):

> Contrary to the suggestion of our colleagues, we do not believe that the Respondent must monitor every table conversation to make sure that solicitations do not occur. Thus, if the employer has reasonable cause to believe that union agents are soliciting at a table (e.g. they are talking to employees and displaying cards), the employer may invoke an otherwise valid rule against solicitation. And, if the employer has reasonable cause to believe that other persons are engaging in comparable solicitation, the employer may apply such a rule to that activity. In order to establish a violation, the General Counsel would have to show that the employer forbade the union agent's conduct and permitted the other person's comparable conduct.

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65. There is no claim or issue that Respondent's employees are beyond the reach of reasonable efforts by the union to communicate with them.

I find General Counsel has met this burden. While others were seated on the benches and were in the same general area as Harland that September day, the guard only asked Harland to leave. Harland readily admitted the security guard knew he was a nonemployee union organizer. While Respondent may argue the security guard had reason to believe Harland was violating a hospital rule, Harland informed him he was merely waiting for a ride. The guard then informed him he was not permitted to be there and his statement indicated exclusion regardless of activity. There was no sign on or near the bench limiting its use. This ban was imposed prior to Respondent's issuance of the memorandum by Smith on or about November 2 and the solicitation andl distribution rule.

Moreover, the guard issued a general ban against Harland being on Respondent's property regardless of his activities, when he walked him to the end of the street on Welch and instructed him "don't come back." Harland's actions at this time were not shown to be in violation of any of Respondent rules or policies either before or after November 2. That Harland walked back to the same area and met the employee, then left in her relatives car, does not constitute repudiation or mitigation sufficient to remedy the situation. The record has several examples of individuals waiting for workers to give them rides in vehicles in front of or near exits of Respondent's facilities. This testimony was not refuted. There is no claim by Respondent that it routinely or by a date certain, precluded friends, family and other nonemployees from waiting on or near its property to give rides to employees. Accordingly, I conclude the guards' removal of Harland in September was violative of Section 8(a)(1) of the Act because it discriminated against him because he was a union organizer.

Assuming Harland's eviction was not discriminatory, I find, under applicable California precedent, Respondent improperly removed Harland from its premises because he was in a place any other member of the general public merely peacefully sitting on that bench was considered as lawfully stationed. *Sears*, supra. General Counsel also persuasively argues Respondent did not demonstrate the exclusion of Harland was persuant to reasonable time, place or manner restrictions. Halrland's sitting on a bench awaiting a ride was similar to the normal activity that occurred at that location at that time. *Grayned*, supra. Respondent failed to establish its removal of Harland was based on any objective criteria inasmuch as the restriction against his sitting on the bench awaiting a ride was not shown to have been based on any interference with the conduct of Respondent's business or the customary use of the bench, such as impeding or blocking movement of patients or visitors. There was no evidence anyone was inconvenienced to the least degree by Harland's sitting on the bench. Id. at 853. Accordingly, under this alternative theory, I find Respondent improperly evicted Harland in violation of Section 8(a)(1) of the Act.

4. Union access under the Moscone Act

General Counsel argues that California law, particularly the Moscone Act, Cal. Code of Civ. Proc. Sec. 527.3, prohibits Respondent's exclusion of the nonemployee organizers. The seminal case on this issue is *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979), 599 P.2d 676 (1979). The *Sears* decision involved a union's peaceful picketing on Sears' privately owned sidewalks that it had opened up to public use.

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For the purposes of this decision, I find Respondent's sidewalks where the union organizers were handbilling or waiting to meet an employee, are analogous to the sidewalks in the *Sears* case. Respondent did not post the areas involved with no trespassing or other signs limiting their use and access. The area involved in the Ramirez exclusions served a public bus as well as a University shuttle without limit to the identity or purposes of the passengers. The area where the three union organizers were handbilling on or about November 2, was at the intersection of several pathways joining parking, Hospital and University facilities.

There was no evidence of littering, disturbance, disorder or other interference with the use of the Hospitals, University, parking or the orderly use of the sidewalks and streets. There is no question the union organizers conducted themselves in a peaceful and quiet manner at all times involved herein. There is no claim the union organizers engaged in any unlawful activity other than Respondent's claims of trespass. There were no claims of breach of the peace, disorderly conduct, blocking access or egress to any area within Respondent's leasehold or control, or interference with Respondent's State Constitutional right to privacy. See *In re Frederick A. Hoffman et. al.*, 67 C.2d 845, 434 P.2d 845 (1967).

The *Sears* case was decided on remand from the Supreme Court to determine the appropriateness of enjoining the union's picketing on Sears' sidewalks under State law. The *Sears* decision concluded the Moscone Act "establishes the legality of certain labor practices and limits the equity jurisdiction of the superior court to enjoin such practices."

Thus, General Counsel convincingly argues, there was no trespass and the *Lechmere*, decision requires the employer to have a property interest sufficient to make the union's presence a trespass. The Moscone Act exempts the handbilling and other organizing activities of the nonemployee union organizers from the State's trespass laws. Therefore, Respondent could not lawfully evict or attempt to evict these union organizers under applicable State law in the circumstances of this case.

The *Sears* court, supra, referred to the preamble of the Moscone Act which provides:

> In the interpretation and application of this act the public policy of this state is declared as follows:
>
> Under prevailing economic conditions the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. It is therefore necessary that he have full freedom of association and self-organization and the right to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection. . . .

Subdivision (b) of the Moscone Act provides:

> The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or

persons,[66] whether singly or in concert, from doing any of the following:

(1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful[67] picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers.

(3) Assembling peaceably to do any of the acts specified in paragraphs (a) and (2) or to promote lawful interests.

The *Sears* decision found the last clause on subdivision (a),[68] requires the conclusion that "the provisions of subdivision

66. This subdivision clearly does not limit its application to the activities of employees for it refers to the defined actions of any person or persons.

67. I find this provision clearly includes the peaceful noninterfering handbilling by nonemployee union organizers,. The incidents were in areas "where any person or persons may lawfully be."

68. Subdivision (a) of Sec. 527.3 declares:

In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining,

(Cont'd)

(b) . . . shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes." The *Sears*, court maintained that even prior to the Moscone Act, a prior State court decision: "establishes that peaceful picketing on privately owned walks outside the employer's store is not subject to injunction, those decisions also explain that judicial intervention in such a case is 'unnecessary' to protect substantial rights of the employer."

The *Sears* decision, citing both state and federal precedent, found both governing entities "may grant unions rights to conduct activities on the employer's property, albeit, private property." Therefore, the court concluded the union's picketing on private property "is lawful conduct so long as it does not involve fraud, violence, or breach of the peace." Moreover, it determined "a person does not violate subdivision (n) [of the Penal Code section 602] by refusing to leave property on request of the owner, his agent, or the lawful possessor of the property, if the person is 'engaged in lawful labor union activities which are permitted to be carried

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(Cont'd)

> picketing or other mutual aid or protection, and to prevent the evils, which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes.

out on the property by the California Labor Relations Act. or by the National Labor Relations Act.'" That the *Sears* case involved a retail store does not alter the applicability of the Moscone Act to this case.

Respondent's witness Watkins admitted its understanding of the circumstances leading to the removal of individuals from the Hospitals' properties were based on the laws of trespass as follows:

> A. Well, it could be a number of circumstances. The general circumstances would be being disruptive to patient care or business operations, which would fall more under normal trespass. The being in a restricted area all the way to not having a purpose to be in the hospital or the area in the hospital that they're in. Soliciting material or membership or organizations or selling things, really of any kind. Those types of reasons would be a reason to talk to somebody about their right to be in the facility.
>
> Q. Does the Security department maintain a record of those people that it removes because of trespass?
>
> A. Yes, it does.

There is no evidence the incidents involving eviction or attempted eviction of nonemployee union organizers in this case involved circumstances where they were disruptive of patient care or any of the business operations of the Hospitals. The Supreme Court in *Lechmere, Inc. v. NLRB*, supra 502

U.S. 527 at 535, acknowledged the impact of the *Sears* decision on Section 7 and concluded "arguable Sec. 7 claims do not preempt state trespass law, "in large part because the trespasses of nonemployee union organizers are 'far more likely to be unprotected than protected.'" The fact that the union activity is protected rather than private property rights under California law, does not alter this holding of *Lechmere*. Thus, under California law, nonemployee union organizers peaceful handbilling or other lawful ctions are not trespass and are protected conduct.

The Moscone Act clearly privileges peaceful handbilling by nonemployee union handbilling on private property and exempts such activity from its trespass provisions. The State's laws do not protect property owners or their appropriate agents from the requirements of the National Labor Relations Act for conduct not shielded by its trespass laws. The State abrogated Respondent's property rights in the case of peaceful and otherwise lawful union handbilling and other organizing activities. The United States Supreme Court has not found the granting of access to nonemployee union organizers "an unacceptable 'compelled subsidization.'" *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Lechmere*, id at 98. Therefore, I conclude that under the circumstances of this case, Respondent was not privileged under state trespass laws to exclude or attempt to exclude the nonemployee union organizers from hand-billing or meetingemployees during certain times and in certain places outside the Hospitals.

Respondent argues the Moscone act does not confer any substantive rights to the nonemployee union organizers where there is no public forum. In *Allred v. Shawley*, 232 Cal. App.

3d 1489 (1991), involving enjoining antiabortion protesters from entering a private parking lot of a professional center, the court noted "the heightened weight given to the speech rights . . . because they pertained to union interests." The property involving these union interests, contrary to Respondent's contentions, was not limited to public forums. Rather, as was noted in the *Sears* decision, the private property interests of the owner or appropriate agent, were subrogated to those of the state where concerted employee activity was concerned, including the activities of nonemployee union organizers, as exemplified by the reference to "any person" in the Moscone Act being included in the protected activity.

Respondent's letter to the Union by Smith and the actions of its security agents enforced and then published an invalid policy. Since these handbillers were lawfully on Respondent's asserted property, assuming arguendo it was within the leaseholds, its exclusion and attempts to exclude these handbillers, therefore, is violative of Section 8(a)(1) of the Act because Respondent interfered with activities protected by Section 7 of the Act when those union organizers were in location the may legally handbill or meet employees under California law

I conclude Respondent's claim its action in excluding or attempting to exclude the union organizers were de minimis to be without merit. Respondent did not reverse or otherwise attempt to repudiate the actions of its security guards. While Ramirez, during one incident, initially engaged in activities in the Stanford Hospital cafeteria, she was also asked during the incident to leave the area of the bus/shuttle stop and go

to a parking lot. Ramirez complied and went to the parking lot. Respondent claims she continued her activities there without interference. There was no demonstration the employees she reached in the parking lot were all the same employees she would have contacted at the bus/shuttle stop. In fact Ramirez testified, without contradiction, that she could not contact some of the employees she would have contacted at the bus/shuttle stop. Some of the employees may have used the bus or shuttle and not have been in the area of the parking lot. As noted above, Respondent agents' action within the hospital are not claimed or found to be violative of the act.

In sum, I conclude Respondent has failed to establish that the union organizers it evicted or attempted to evict were clearly within its leasehold; the eviction of Harland from its leasehold was discriminatory or otherwise unlawful; the Hospitals are not public forums; and, the Moscone Act limits Respondent's property rights so that even if the handbillers were within its leasehold, Respondent was not privileged to evict or attempt to evict them under the Moscone Act. Respondent failed to prove these actions were necessitated by the Hospitals unique patient care responsibilities. Accordingly, I conclude its evictions and attempted eviction violated Section 8(a)(1) of the Act.

B. Is Respondent's Solicitation and Distribution Policy Overbroad?

General Counsel and Charging Party claim Respondent's solicitation and distribution policy is overbroad because it unlawfully bans solicitation and distribution in patient admitting and registration areas, general waiting areas and lounges,

hallways and other unspecified areas where patients visit with friends and family. The two lead cases involving hospitals rules concerning solicitation and distribution are *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979) and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

The general principles concerning the balancing of employer and employee rights was stated in *NLRB v. Babcock & Wilcox Co.*, supra, 351 U.S. 105, 112 (1956) as follows: "Accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." The Board applied this holding by establishing the presumption that any restrictions on employee solicitation and distribution during nonworking time in nonworking areas are violative of Section 8(a)(1) of the Act unless the employer demonstrated special circumstances or a need to maintain production or discipline. The determination in this decision are based on the predicate any solicitation or distribution would not occur on working time in working areas.

In *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), the Board found a different rule should be applied to hospitals than other business based on their special circumstances and attributes, as following:

> [T]hat the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted. For example, a hospital may be warranted in prohibiting

> solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients — particularly those who are seriously ill and thus need quite and peace of mind.

The Board further determined in the St. John's Hospital case it had to consider the circumstances to ascertain the probability of disruption of patient care in areas like lounges and cafeterias. The Board held, absent a demonstration disruption of patient care would result if solicitation and distribution were allowed in those areas, a rule preventing solicitation at those locations is overbroad. The Board, therefore, indicated it would consider as presumptively invalid, hospital rules that ban solicitation in other than "immediate patient care areas." There is a greater limitation on distribution. Distribution may be banned from work areas that are not patient care areas. Respondent cannot ban distribution in non-working areas during non-working time unless it had demonstrated the prohibition is necessary to maintain discipline and production. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

The Court held in *Beth Israel Hospital v. NLRB*, supra at 506-508:

> In the hospital context the situation is quite different. The main function of the hospital is patient care and therapy and those functions are largely performed in areas such as operating rooms, patients' rooms, and patients' lounges. The Board

> does not prohibit rules forbidding organizational activity in these areas. . . .

In summary, we reject as without merit petitioner's contention that, in enacting the 1974 health-care amendments, Congress intended the Board to apply different principles regarding no-solicitation and no-distribution rules to hospitals because of their patient-care functions. We therefore hold that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act. . . . Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar.

1. Clear patient care areas

I find the units housing patients and the waiting areas for patient services such as radiology, oncology, outpatient surgery, endoscopy, laboratory work and other procedures and therapies are clearly immediate patient care areas as defined in *St. John's Hospital & School of Nursing*, supra, That Respondent engaged in distribution of its anti-union literature in some of the units, does not alter the fact that the activities within the units is clearly immediate patient care and Respondent's actions do not abrogate or alter the need to protect the provision of immediate patient care in these areas. I further find the day rooms, which are also used by

employees, because they are within the units and are clearly areas that are used by patients and their families to visit and are overseen by the staff for patient care, are also properly included in the ban. The Union, for the purposes of this proceeding, assumes the hallways inside the nursing units qualify as working areas and therefore the ban on solicitation distribution in these inside the unit hallways is appropriate.

Some of the units have break rooms. Respondent has not demonstrated these rooms, designed for employees to take their breaks and meals, should be included in the ban of solicitation and distribution. The employees have two 15-minute breaks and one-half hour for their meal period. The breaks are staggered and there may not be the requisite privacy in those break rooms in some units. Therefore, the Union argues, there is a need to permit solicitation and distribution in areas close to the employees work stations. The question then is whether Respondent has borne its burden of proving the ban against employee solicitation and distribution to outside the units hallways, waiting areas, admitting areas and/or registration areas, except the break rooms, was justified by demonstrating these were immediate patient care areas "as necessary to avoid disruption of health care operations or disturbance of patients." *Beth Israel*, supra, at 507.

In this case, employee solicitation and distribution are permitted in the hospitals' cafeterias. In *Baptist Hospital*, the Court found, in fn 11: "Solicitation may disrupt patient care if it interferes with the health-care activities of doctors, nurses, and staff, even though not conducted in the presence of patients. And solicitation that does not impede the efforts

of those charged with the responsibility of caring for patients nonetheless may disturb patients exposed to it." The court considered the testimony of some of the hospital's medical staff concerning their perceptions of the effects of solicitation being disruptive of patient care and the success of treatment in areas where patients and their families may be disquieted by the actions of hospital staff that demonstrated concerns other than patient care.

The Supreme Court held in *Beth Israel Hospital*, 98 S.Ct. 2463 (1978) at 2472-2473:

> If Congress was willing to countenance the total, albeit temporary, disruption to patient care caused by strikes in order to achieve harmonious employer-employee relations and long-term improved health care, we cannot say it necessarily regarded appropriately regulated solicitation and distribution in areas such as the cafeteria as undesirable without evidence of a substantial threat of harm to patients. In light of Congress' express finding that improvements in health care would result from the right to organize, and that unionism is necessary to overcome the poor working conditions retarding the delivery of quality health care, we therefore cannot say that the Board's policy — which requires that absent such a showing solicitation and distribution be permitted in the hospital except in areas where patient care is likely to be disrupted — is an impermissible construction of the Act's policies as applied to the healthcare industry by the 1974 amendments.

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The next question then, is whether Respondent bore its burden of demonstrating "a substantial threat of harm to patients," Ibid, through the evidence it adduced in this proceeding concerning the areas outside the units as well as treatment, procedure and therepy waiting rooms.

2. Should the opinion testimony of Respondent's witnesses be considered?

Charging Party argues under *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993). Respondent failed to demonstrate their experts testimony met the requisite standard of evidentiary reliability. The *Daubert* "gatekeeping" requirement of experts is not restricted "to scientific testimony but to all expert testimony," including technical and other specialized knowledge. *Kumho Tire Co. v Carmichael*, 526 U.S. 137, 141 (1999). It is important to note the gatekeeping function required in *Daubert* and *Kumho*, does not supplant cross-examination and the presentation of contrary evidence as the appropriate means of testing shaky or questionable testimony. *Daubert*, supra at 596.

The testimony here in issue is experience based testimony that the *Kumho* decision stated may be subject to the *Daubert* criteria. The first question is whether the *Daubert* or other reasonable criteria are appropriate in this instance. The *Daubert* criteria applied to: "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." The *Kumho* decision expanded the *Daubert* criteria to all expert testimony. The *Daubert* criteria required the trial court to determine: "(1) whether the theory can and

has been tested; (2) whether the theory has been subject to peer review; (3) the known or potential rate of error; and (4) the theory's general acceptance." Ibid at 593. As the *Kumho* court held: "But as the Court stated in *Daubert*, the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."

Charging Party and General Counsel argue the opinion testimony of Drs. Gregory, Hammer, and Ms. Flanagan[69] is not admissible under Rule 702 of the Federal Rules of Evidence, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The first requirement under this rule is the expert's knowledge must be helpful to the finder of fact. I conclude the testimony of Drs. Gregory, Hammer, Ms. Wayman and Ms. Flanagan meet this criterion. The second requirement is the witness must be qualified. Dr. Gregory has been a physician for thirty-six years with a specialty in internal medicine and liver disease. He is employed as the Senior Associate Dean at the University's medical school. From September 1994 through November 1997 he was the chief medical officer at the Respondent's predecessor Stanford

69. I have also considered the testimony of Wayman using the *Kumho* criteria.

Health Services. Since April, 1999, he has been the Chief Medical Officer at Stanford Hospital. He has been a treating physician since his graduation from medical school in 1963. During the course of his duties as a treating physician he talks to patients and their families frequently. There was no challenge to Dr. Gregory's status as an expert.

Dr. Hammer has been a doctor of medicine since 1976. He has been a pediatrician since 1980 and currently practices general pediatrics. He was also an assistant then associate professor of pediatrics at Stanford University since 1982. He is currently the Medical Director for Ambulatory Care Services at LPCH which covers all the outpatient clinical services at LPCH and "those that are satellites to" LPCH. He treats both inpatients and outpatients. In the course of treating pediatric patients, which he considers includes individuals through the age of 18. he routinely deals with their parents "[a]ll the time." Based on his background, I find Dr. Hammer is an expert.

Ms. Flanagan is the vice president for Patient Care Services at Stanford Hospital. She has held the position for one year. Prior to that, she was employed in the same position as LPCH's predecessor. For nine years before that appointment she was the administrative director for Maternal Child Services at the University of California, San Francisco. She is a registered nurse holding a Bachelor's and Master's degree of science. She has been a nurse for 27 years, principally "in pediatric and intensive-care-unit settings in a variety of different academic medical centers and children's hospitals." She worked as a staff nurse for about 17 years and an administrator for the past 10 years. She oversees the

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Family Resource Center at LPCH whose mission includes augmenting the efforts of LPCH's health care team by providing medical information and health education; fostering understanding of pediatric medical and health issues, assisting the patients and their families to cope with illness and hospitalization, encouraging communication between patients, their families and the health care professionals and, contributing to the healing environment of the hospital through reading, storytelling, and the arts.

It was not established on this record how frequently she met with patients and their families in the past or, whether her administrative duties the past ten years brought her into regular contact with patients and their families in a setting that lends validity to her opinion:

> [T]hat families play a greater role in the pediatric setting, because children are emotionally immature and they really are very dependent on their families to help support them during a hospitalization. . . . Because they really need to be there with the child to help comfort the child, to help familiarize the child with the surroundings, to help really convey to the staff the child's routines at home so we can incorporate them into the hospitalization. We have to do many painful procedures to children, such as stick them with IV's and do other procedures, and we really rely on the parents to help us comfort the child during these procedures.

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Respondent failed to establish how Flanagan's oversight of the Family Services Program or other duties have made her an expert in the needs of patients and their families and visitors, particularly in the registration or admitting areas, waiting areas and hallways outside the units.

There was no evidence how frequently she has met with patients and their families or the subject matter of these meetings. There was no evidence how frequently she visited and examined the areas outside the units that Respondent included in its solicitation and distribution policy. There is no evidence she participated in the formulation of the rule circulated to the entire staff of both hospitals after the commencement of the union organizing campaign. Accordingly, I conclude Flanagan has not been shown to be an expert concerning the needs of patients and their families in these locations. Moreover, on one or more occasions during her testimony she did not appear to be very familiar with these areas.

The next issue is whether the testimony of these witnesses, which are clearly opinions, are based on sufficient facts or data. Wayman is currently employed by the University's Department of Pediatrics. One of her duties "is as the director of the Family-Centered Care project, which is a project that's looking at modifying patient care as we give it today and it's, again, a research project using parent focus groups as a way to gather information to change that model of care."

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Wayman described the project as follows:

> It's model of care that moves away from the current care, which is an expert-driven model where physicians tell patien s what to do and they do it, or not, and then looking towards partnerships in which parents and physicians and other health care providers are making decisions together on the child's health care plan.

To reach this goal, Wayman stated that she is developing the "research methodology which is, as I said, as a focus group methodology and also come up with quantitative measures. To develop a model of [sic] program, a training program for families and health care providers. To make sure this model shows efficacy and, thereafter, to broadcast it throughout the hospital." She began this research project at another hospital and it was moved to the University in 1994. She holds monthly focus groups with families and healthcare professionals to determine what aspects of hospital care they consider not supportive of the patients and families needs. She has prepared several periodic reports. She also meets with families individually. The project's data must be summarized yearly. Some of the results of her study are incorporated into the models and training material developed during the course of the study. She and/or Respondent did not present any of the reports, training materials or models developed as a resu't of the study to this trial. This failure was unexplained. Wayman admitted the study was based on a set of presumptions which are being tested by the program. Based on the results of the study, the program will be modified or discontinued. She did not give any of the

preliminary results of the study. This failure was unexplained. Respondent did not present any similar studies preformed in other hospitals.

Wayman also testified about her experiences as a developmental interventionist where she daily sees children and families on the liver transplant service. She described these duties as twofold: "One is to determine the child's developmental status and see how the child's responding to the hospitalization. And the second is to work with the family in terms of their ability to negotiate the hospitalization." I conclude she is an expert in this area. She described one result of the focus groups was the determination:

[T]hat parents feel very reluctant to ask questions, to advocate for their child while in the hospital; that they have a lack of social support. So, our training is really focused on those aspects. How do you develop a partnership with health care providers? How do you ask questions? If you don't feel supported, where do you go to get the support? Who do you go to to get the support? We're really focusing on empowering families to be able to ask questions while their children are hospitalized. . . .

So, if you are — after we give them the strategies to work with health care providers in the hospital, then we're in the hospital room supporting that partnership between health care providers and the families and being a mediator between the two.

She opined, based on her research and experience, that staff members; talking abruptly to parents, appearing too

busy, not getting needed information, and the lack of social support, are some of the many barriers to developing the desired family-care giver partnership. She has determined from her study the parents primarily want access to good information, including direction as to how to acquire that information. They also want assistance from mentors to assist them in getting that information and to help them advocate for their child. Parents have also raised the need for more privacy

> [T]hat people don't walk in the door without knocking, that they have time for release and recovery, quiet time, down time, psychological recovery.[70] That health care providers approach them in terms of sharing information instead of telling them how the day's going to go.

So, for instance, health care providers typically come in and tell them what the plan for the day will be. We're now changing health care provider behavior to come in and say, "What are your expectations for the day? How would you like to see the day go?" and then coming up with a plan together. Those kind of strategies. . . .

In the hospital room, parents are often inundated with people. There's been several studies on the number of people who come into a hospital room, and it can be up to 44 in a day. They're inundated with information.

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70. She defined recovery as "getting a break from the intensity of the room."

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They're required to make decisions, multiple decisions during the day. They need time where they can focus on themselves, to have some quiet time, time without interruption, time with other family members without interruption, and — where they're not affected by things going on in the hospital.

According to Wayman, the families go for quite time and recovery to the alcoves in the hallways outside the LPCH units, the waiting rooms outside the family resource library, the family lounge, and the playroom or day room "because they'll take siblings or even their child to the playroom. That's a place where there's not active health care going on. There's developmental intervention going on."

According to Wayman, when she participates with families in the decision making process, they meet in a variety of locations depending on the nature of the decision under consideration.

> If there are decisions, of course, such as removal of life support or patient selection, we are in enclosed rooms. If it's a decision where families — when we're doing some of that mediation or discussing the plan for the day, we will meet in the alcoves if the room is not appropriate, the room of the child old enough to understand what we're talking about.

Or if we're looking at developmental status, well, we can go to the playroom and we'll do our intervention in the playroom and discuss what the next steps should be.

It depends on the level and the sensitive — sensitivity of the information.

Wayman did not testify how frequently she participated in conversations with parents in the alcoves adjacent to the atrium on the second and third floors of LPCH. She did not testify to having any such conversations either inside or outside the units at Stanford Hospital. Her testimony concerning her observations of where patients and their families go is based solely on her experiences with the liver transplant patients and their families involving the unit located on the second floor of LPCH. Within the unit housing the liver transplant patients at Stanford Hospital, there is a dayroom. Wayman speculated that the social workers and other professionals could meet with families in a family room or alcoves outside the unit, in the patients' rooms depending on the nature of the conversation, whether it is a double occupancy room with both beds occupied,[71] and the age of the patient. She opined the alcoves were preferable because the day room and family waiting room are more likely to have other families and patients in them.

Wayman has observed social workers speaking with families in the alcoves while people walked past them in the adjoining hallway four or five feet away. She has not received a specific complaint from patients in the waiting areas outside the transplant unit that employees passing by disturbed them. She only received generalized complaints concerning the lack of privacy in the hospital. Patients would like to have more

71. She admitted on cross-examination that at times, all that is done in a double occupancy room is to draw the curtain around one bed to hold a conference with the patient and/or family.

enclosed rooms for privacy, rather than the alcoves which are open to all passing in the hallway. She has not received a specific complaint concerning people passing by the alcoves. Wayman further testified parents infrequently go downstairs to the LPCH atrium for recovery. Her testimony indicates LPCH patients and their families do not have an expectation of privacy in the wating areas and adjoining hallways outside the units.

Under the *Daubert* criteria, I find the testimony of Drs. Gregory and Hammer, Ms. Flanagan and Ms. Wayman relevant to determining the issue of the scope of the area included in the term patient care. The next area of concern is whether their testimony is reliable or even subject to the requirements of Rule 702 of the Federal Rules of Evidence. None of their testimony has been shown to have been subjected to peer review or publication. Their observations of patient and family needs do not have a known or projected rate of error. However, the observations of Drs. Gregory and Hammer and Ms. Wayman were based on their first hand observations. The *Kumho*, decision specifically made expert testimony based on observation and experience the subject of the reliability test of *Daubert*.

Respondent has not adduced any evidence of the results of Wayman's study. Although Wayman testified the theory behind the study has been around since about 1950, Respondent has failed to introduce any literature or preliminary results from Wayman's study that has been subjected to peer review or publication. In fact, Respondent is subjecting the validity of the claims of these witnesses that the families need to be free from employee solicitation

and distribution throughout the areas described in its rule to be tested in the study headed by Wayman. However, the *Daubert* and *Kumho* Courts recognize the inapplicability of the factor of general acceptance to "help show that an expert's testimony is reliable where the discipline itself lacks reliability. . . ." However, in the instant case, the general reliability of these witnesses observations during the course of their practices have not been shown to come from an unreliable discipline, and therefore establishes some ground for finding their testimony reliable.

As noted in *Kumho Tire Co.*, supra, at 152:

> It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in a relevant field. . . . [T]he trial judge must have considerable leeway in determining the reliability of challenged expert testimony. . . . That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.

The initial question, then, is whether the observations of Drs. Hammer and Gregory present a theory concerning family and patient needs that can and has been tested. Wayman is testing these needs in her study but Respondent has failed to adduce the admittedly available documents detailing any of the results of her study. This unexplained failure raises in inference the study results to date would have

been adverse to Respondent's position and would not have supported Drs. Hammer and Gregory and Wayman's testimony. *SDC Investment, Inc.*, 299 NLRB 779 (1990) and cases cited therein. Wayman's activities demonstrate the issues addressed by Drs. Gregory and Hammer are subject to scientific study and evaluation. Wayman testified the theories she is testing were postulated in the 1950's and are the subject of studies. The results of any of these studies were not placed in evidence. Any oversight and evaluation of Wayman's studies was not placed in evidence so there is no information concerning peer review, publication or whether her information has been tested. Respondent through Wayman or otherwise did not address the issue of the known or possible errors in the positions adopted by its witnesses.

The last *Daubert*, factor is the theory's general acceptance. While the similarity of the testimony of Drs. Hammer, Gregory and Wayman could be argued to favor a finding of general acceptance, the evidence of record, including Respondent's rules or lack thereof, mitigate against such a finding. Respondent does not limit any conversations other than solicitations. Drs. Hammer and Gregory testified any conversations that did not deal with patient care could be upsetting to families and patients.

Respondent has not adduced any reliable testimony that union solicitations are any more disturbing than conversations involving religious, political or other potentially volatile subjects. The employees similarly are not restricted from passing magazines that might contain controversial articles to one another. Respondent does not screen the periodicals and other reading materials it sells on

its premises to avoid patients and their families from seeing potentially controversial information. Drs. Hammer and Gregory did not see any solicitation or distribution, therefore they could not testify as to the actual impact of such activity upon patient care. That Respondent does not restrict employees use of the waiting areas outside the units or the content of their discussions or activities save for solicitation and distribution raises the inference employees' activities such as discussing controversial subjects or passing controversial literature nnote related to unionization is not perceived by Respondent as disruptive of health care. Based on the unrefuted evidence, the opinions of Drs Hammer, Gregory and Wayman were merely unsubstantiated surmise.

Drs. Hammer and Gregory, Flanagan and Wayman did not claim to have conducted any research into the effect of union or other solicitation and distribution upon patients and their families. The Court in *Daubert*, supra at 590, defined knowledge as:

> The word 'knowledge" connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good ground.

Respondent, based on its institutional knowledge, has not seen fit to limit the general scope of the conversations of its employees to non-controversial subjects within the patient units. Therefore, I find it has failed to demonstrate the opinions of two of its doctors and one of its administrative staff, who has not been shown to deal regularly with patients

and their families in therapeutic settings, is more than subjective belief. Respondent receives and monitors patient complaints, including complaints from families, yet it admits it has not received many, if any complaints concerning employee solicitation and distribution. Respondent has also not analyzed the complaints to demonstrate it has a factual basis to infer employee solicitation and distribution are more detrimental to patient care than conversations and printed materials dealing with controversial matters. In fact, newspaper and other media comments concerning the instant organizing efforts were distributed in the Hospitals in newspapers and on television. There is no evidence patients and families seeing or observing this reporting of the Union's efforts were adversely affected, nor did it impact upon patient care.

I further find Respondent did not establish by other means that the testimony of its witnesses was otherwise reliable. In addition to failing to differentiate solicitation and distribution from other potentially disruptive conversations and actions, Respondent itself, on several occasions, permitted distribution of its anti-union flyers in undisputed patient care areas where Respondent mentioned the potential for strike. Respondent's institutional experience did not cause it to insure the distribution of this material was done in a manner that it was not visible to patients and their families.

I further find the testimony of Respondent's witnesses does not qualify as lay opinion testimony under Rule 701 of the Federal Rules of Evidence, which provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or

> inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Drs. Gregory and Hammer and Ms. Flanagan admitted they never heard employees engaging in solicitation and never observed employees distributing materials to one another in the areas of the hospital outside the units and other immediate patient care areas involving admission, registration, therepy and proceedures. They never observed this activity involving patients and their families. Therefore their observations and speculations concerning their opinions about such activity is not based on first hand knowledge or observations. *U.S. v. Rea*, 958 F.2d 1206, 1215 (1992). Their opinions have not been shown to have greater reliability than mere speculation. *Medical Center Hospitals*, 244 NLRB 742 (1979). Moreover, the opinions of these witnesses were admittedly not the genesis or other impetus in the issuance of the solicitation and distribution policy. Monroe admitted Respondent's medical staff did not request the policy and there is no claim its medical staff was consulted prior to its promulgation and distribution. Monroe did not present any testimony establishing the policy was prepared with the specific design to meet patient care needs.

In contrast to the testimony in *Baptist Hospital*, Respondent did not adduce any reliable evidence concerning its reasons for adopting the rule other than unspecified unadduced complaints. Monroe was the sole witness to testify concerning the genesis for her publication and distribution

of the solicitation rule and she gave as her reason "[t]o clarify the policy and to make sure that employees had a copy of the policy." She determined to "clarify" the rule "because there was quite a bit of solicitation, or complaints about solicitation and passing out of literature on the premises." She did not specify the content or genesis of the complaints to tie the complaints into concerns "about the ill effects of union organizational activity on patients." 442 U.S. at 782-783. Monroe did not claim the policy was promulgated and distributed due to concern solicitation and distribution in those areas outside the units and waiting areas for treatment, diagnostic procedures or therapy would have an ill effect on patients or impact adversely on patient care.

These "complaints" could have come from hospital managers who were participating or assisting in Respondent's anti-union campaign. There was no specific nexus established by Respondent between these complaints, the context and content of which were not provided on the record, and patient care concerns. Respondent's failure to have such a solicitation and distribution policy prior to 1997 was not shown to have resulted in any adverse impact upon patient care. This lack of specificity and evidence of causal nexus, leads to the conclusion the rule was promulgated to include all corridors and waiting areas, not just those involved with immediate patient care, "to stifle and interfere with the employees' exercise of their Section 7 rights." *Youville Health Care Center*, 326 NLRB No. 52, slip op. at 1 (1998). Moreover, the testimony of Respondent's witnesses appears to be post hoc to the formation and issuance of the rule, thus, this evidence did not reliably establish the need for the rule since the reasons advanced by these witnesses were not shown to

be a predicate for its formation. *Southern Maryland Hospital*, 293 NLRB 1209, 1219 (1989).

3. Is the Rule Overbroad by Including Waiting Areas and Hallways Outside the Units?

Assuming, arguendo, the testimony of Drs. Gregory, Hammer, Wayman and Flanagan is reliable opinion evidence, it still does not establish the necessary nexus between the rule and their concerns. These witnesses did not differentiate the actions of Respondent's employees during solicitation or distribution activities and their allowable conversations and distributions, even if they involved controversial subjects. The only solicitation Flanagan observed occurred in a normal tone of voice. There is no evidence such activity in the disputed areas is or would be more disturbing to patients and their families than the permitted conversations about controversial matters.

There are the patients' rooms, day rooms and conference rooms within the units which are used for the sensitive discussions with patients and/or their families. There is no evidence such activity in these areas outside the units and other treatment and diagnostic areas, would be more disruptive or upsetting than a concert or musical event containing music which a patient strongly dislikes, Dr. Gregory admitted such disliked music would disturb a patients tranquility. Respondent does not ban employees from the waiting areas outside the units, the registration area or the hallways. It does not limit their conversations in these areas beyond the policy here under consideration.

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Respondent has not adduced any evidence that conversations concerning union or other solicitations are more disruptive or harmful to patient care than any other conversation that did not involve patient care. To the contrary, Respondent's witnesses testified the patients and families are disturbed by any conversations or activities that do not directly relate to patient care. Respondent has failed to justify its differentiation of the banned conduct from the permitted conduct. Flanagan attempted to analogize the upsetting of family members to the upsetting of patients. However, Respondent admitted that any activity that does not appear to focus on patient care is upsetting to families, yet it does not include all such behavior from its ban. This failure was unexplained and the basis for its selectivity not presented and therefore unjustified.

For example, Flanagan admitted if a patient or family member observed an employee passing a piece of paper to another employee, they would have no predicate to assume this activity was not patient related. Respondent's failure to restrict conversations and other actions involving controversial subjects in the disputed areas indicates it does not consider such activity adverse to immediate patient care. Analogously, solicitation and distribution in the outside unit waiting areas and hallways would be similarly not disquieting to patients and their caregivers, even if the caregivers are assumed to include family.

As noted above, Respondent did not restrict the areas where it supervisors could distribute anti-union literature. Respondent similarly failed to distinguish its own activity from the distribution of Union literature. While Dr. Hammer

opined it would be disturbing for a patient or families to see literature in the hospital referencing the possibility of strikes, Respondent did circulate literature mentioning the possibility of strikes at the hospital without limiting the areas of its distribution. This literature was posted and/or retained in areas that were accessible to patients and their visitors. There was no Union literature placed in evidence that similarly referenced the possibility of strikes. There was no evidence the placement of the Respondent's strike referring literature where patients could see it had an adverse impact on patient care. Unlike the testimony in *Baptist Hospital*, Monroe's testimony did not claim a nexus between the issuance of the rule and concern for creating a tranquil environment for patients in the areas outside the units and treatment and procedure waiting rooms.

The testimony of health care workers appearing for General Counsel and/or Charging Party further disputes the testimony of Drs. Gregory and Hammer and Ms. Flanagan. Fonseca has worked throughout Stanford Hospital and was in most of the waiting areas outside the units in this hospital. There was no specific evidence all of these waiting areas were used by patients or their families. Assuming some use by patients and their families of some of these rooms, the frequency of such use or the relation to immediate patient care was not clearly established by Respondent. There was no evidence patiets or their visitors used these areas after 8 p.m. when visiting hours ended at Stanford Hospital. Therefore, Respondent failed to demonstrate there was a need for the rule outside the units at Stanford Hospital when visitiors were not permitted.

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Fonseca's undisputed testimony is that some of these areas, particularly on the main floor of Stanford Hospital, were noisy without any privacy due to the substantial amount of floor traffic. Respondent's own supervisors apparently felt it was not inconsistent with patient care to discuss the merits of unionization in a first-floor hallway, as demonstrated by the previously described conversation between Fonseca and the assistant nurse manager identified as Roberta. During this conversation patients and employees were walking by. There is no evidence or claim Respondent instructed its supervisors to avoid such conversations prior or subsequent to the promulgation of the rule. This failure buttresses the conclusion Respondent has failed to meet its burden of demonstrating solicitation and distribution in these areas threatens to disrupt patient care or establish this corridor as a patient care area. There was no evidence this area is one where patients wait for or receive treatment.

There was no evidence there is any patient treatment occurring on the ground floor of Stanford Hospital. The atrium is on the ground floor and has wooden benches in the garden and leather couches in various locations around its circumference, Fonseca has observed patients and visitors in the atrium as well as employees engaged in conversation and passing literature to one another. He has distributed literature in this area without comment from patients or visitors who were present at the time. The areas around and including the atriums of both Hospitals have also not been shown to be patient care areas. They are open to the public, the sites of concerts and major art collections. Craft sales attended by patients' families have been held near one atrium, without any claim of disruption to patient care.

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Concerning the waiting area outside the units on the second and third floors of Stanford Hospital, Fonseca has engaged in solicitation and distribution in these areas without complaint or any demonstration these activities disturbed the tranquil atmosphere of the hospital. During shift changes and meal deliveries there is commotion and noise in the corridors. Fonseca has observed an adult and small boy playing catch on the third floor about one month prior to his testimony, without any intervention by staff. He has also observed heated discussions between visitors without any intervention by Respondent. He has observed visitors eating in the waiting areas outside the units. There are no 'quiet' signs posted in these waiting areas nor the adjacent corridors. There was no evidence concerning patient movement in the corridors outside the units. Thus, Respondent has failed to establish solicitation and distribution in these corridors would adversely affect or interfere with patient care.

The testimony of Repetti establishes the waiting areas outsided her unit at LPCH are not tranquil areas functioning as the location of patient care. Respondent failed to demonstrate the hallways outside the units at LPCH are frequently used to transport patients to other areas of the hospital. Thus, I conclude Respondent has failed to sustain its burden of establishing the employees engaging in union solicitation and distribution in the waiting rooms and corridors outside the units and those waiting areas that are not related to treatment and diagnosis is warranted. The doctos who testified indicatedany activities unrelated to a patient's care would be disruptive of such care. On the contrary, Fonseca, Repetti and others have engaged in solicitation and distribution in these areas without adversely affecting patient care or disturbing patients.

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In *NLRB v. Baptist Hospital, Inc.*, supra, at 784-785, the Court found:

> The evidence concerning the corridors and sitting rooms adjoining or accessible to the patients' rooms and treatment rooms on the upper floors of the hospital provide more detailed illustration of the need for a no-solicitation rule applicable to those areas. Patients in the most critical and fragile conditions often move or are moved through these corridors, either en route to treatment in some other part of the Hospital or as part of their convalescence. The increased emphasis in modern hospitals on the mobility of patients as an important aspect of patient therapy is well known, and appears to be a part of patient care at the Hospital. Small public rooms or sitting areas on the patient-care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families — often during times of crises. Nothing in the evidence before the Board provided any basis with respect to those areas of the Hospital for doubting the accuracy of the statements made by [named witnesses] that union solicitation in the presence or within the range of hearing of patients may have adverse effects on their recovery.

In the instant case, unlike *NLRB v. Baptist Hospital*, the genesis for the policy was not shown to be patient use of these areas. There is no evidence that patients are frequently

moved through the corridors outside the units. Respondent has not presented any evidence concerning the movement of patients to and from the units and treatment or procedure rooms outside the units. Respondent has not presented any evidence concerning the frequency of patients using hallways and waiting areas outside the units to walk as part of their recovery regimen or otherwise. The hallways near the cafeterias were not shown to be patient care areas. The location of ATM machines and newspaper racks outside these cafeterias, as well as their access to Stanford University students, particularly medical students, dispels any claim patent care occurs in the hallways near the Hospitals cafeterias. Similarly, the gift shops and hallways adjacent to them, have not been shown to be patient care areas or areas where patient care would be disrupted. Respondent similarly failed to demonstrate the rule was necessary to maintain discipline or effective employee job performance. Thus Respondent has failed to demonstrate the rule was promulgated to further its management interests. While there is evidence Drs. Hammer and Gregory use the waiting rooms outside the units to talk with families, Wayman testified, without refutation, that:

> If there are decisions, of course, such as removal of life support or patient selection, we are in enclosed rooms. If it's a decision where families — when we're doing some of that mediation or discussing the plan for the day, we will meet in the alcoves if the room is not appropriate, the room of the child old enough to understand what we're talking about.

> Or if we're looking at developmental status, well, we can go to the playroom and we'll do our intervention in the playroom and discuss what the next steps should be. It depends on the level and the sensitive — sensitivity of the information.

Thus, there is clear evidence that at LPCH, sensitive material is not discussed with the families in the open hallways and waiting areas outside the units. At times of crises, there is no evidence these outside the units areas are used by the patients or their families for sensitive discussions or conferences. Also unlike the Baptist Hospital case, there is evidence of solicitation and distribution occurring in the hallways adjoining the waiting areas outside the units without any disruption of patient care. Drs. Gregory and Hammer did not observe any such disruptions to patient care in the hallways and waiting areas outside the units. Respondent's apparent lack of concern of disturbances to patient care in these areas is demonstrated by its failure to place these areas off limits for any other conversations or activities other than solicitation and distribution, a rule promulgated and implemented during a union organizing campaign without any documented complaints concerning such activities.

Drs. Gregory and Hammer did not explicate in the requisite detail the frequency, duration and hours of their use of any waiting areas outside the units. Since Respondent's policy bars solicitation and distribution in these areas, including portions of the corridors, twenty-four hours a day, seven days a week, I find Respondent has failed to justify this ban; particularly during the hours when their may be little or no use of these areas by medical care professionals

meeting with patients or their families, or by patients and their families or other visitors.

Those waiting areas adjacent to the main hallway connecting the Hospitals which are not registration areas or waiting areas for treatment, therapy or diagnosis, also have not been shown to be areas where patient care occurs. In fact, Respondent, by Monroe, testified it does not ban solicitation in hallways which are not immediately adjacent to waiting rooms outside the units. I find Respondent has failed to demonstrate solicitation in these non-patient care areas would or did disturb patients. There is no showing solicitation and distribution in these busy hallways on the main floors of the Hospitals would disrupt patient care, in fact Monroe admitted as much. Supervisors are not bared from conversing with employees about the Union in any areas, whether inside or outside the units or other immediate patient care areas.

There is no claim on-duty employees would be disrupted if solicitation and/or distribution were permitted in these outside the unit corridors and waiting areas which I have found have not been shown by Respondent to be patient care areas, as defined above. Supporting this finding is the testimony of the witness who admitted to distributing literature in several of these location. At times, there were individuals in street clothes in the waiting room. These employees never heard of any complaints concerning their activities. Fonseca was in uniform at the times he engaged in distribution.

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Respondent's witnesses have given various definitions and descriptions of the areas considered hallways "immediately adjacent" to waiting, admitting and registration areas. For example, Flanagan considered two to several yards down the hallway from a waiting area to be adjacent to and included in the prohibited areas. Monroe adopted a diferent definition, including those portions of the corridors abutting or adjoining the waiting areas as included int he ban. Respondent failed to explicate whose definition is appropriate. There is no clear and convincing evidence on this record that patients taking walks frequent the corridors and waiting areas outside the units.

In sum, Respondent has not produced evidence of any complaints generated by its employees solicitation and distribution activities and admitted its rule was not a result of such complaints. There is no evidence the employees use of these area displaced any patients or visitors. Dr. Hammer admitted he did not have insight into what patients and their families expectations from employees were in hallways. Thus the inclusion of those hallways not immediately adjacent to those areas found herein to be the sites of patient care has not been documented on this record. Moreover, Respondent has failed to adduce any clear evidence such activities did or would result in an adverse effect upon patient care in the waiting areas outside the units and hallways immediately adjacent to these waiting areas. Dr. Hammer admitted observing employees in one of the alcoves and did not inform them they were barred from that waiting area. Respondent permits activities similar to solicitation such as conversations involving potentially volatile subjects in these areas and does not bar employees from using these areas on breaks and

during meals. Drs. Gregory and Hammer opined these activities which are not banned would have as adverse an effect upon patient care as solicitation and distribution. Respondent has also failed to demonstrate the nature and extent of patient use of these areas, if any.

There is evidence Respondent realized that some solicitation and distribution would not adversely affect patient care nor impede the provision of patient care. For example, as noted repeatedly herein, Respondent distributed antiunion materials in the units. It did not restrict supervisors from seeking to convince employees to not support the organizing efforts of the Union. It did not restrict all controversial conversations or literature or otherwise limit employee's activities that could be analogized to solicitation and distribution. It permitted employee use of the waiting areas outside the units for all purposes other than solicitation and distribution. Respondent has even held parties in one or more of these waiting areas. Similarly the craft and bake sales in these areas were not shown to be disruptive of patient care. Respondent's termination of events was not based on patient care concerns. Monroe admitted the bake sales were stopped because of health considerations and she did not give a reason for the termination of the craft sales.

Respondent left antiunion literature containing potentially upsetting references to strike, laying or posted within units. It permitted CHRONA to post union literature in the hallway near the cafeteria where it could be read by nonemployees. Respondent invited the public to its facilities to view its art collection, to tour its facilities or attend educational or informational forums. The music programs

also can be readily heard in the areas outside the units, which admittedly could be equally disturbing as employee solicitation and distribution.

Accordingly, I find Respondent, based on the evidence in this case, failed to demonstrate the ban on solicitation and distribution on non-working time in the waiting rooms outside the units where treatment or therapy is not occurring and the hallways adjacent to them is warranted because they are patient care areas which would be disrupted by such activities. In this case, the patient care units are enclosed and separate from these waiting areas and hallways. Respondent also failed to demonstrate that patients frequently use these areas for walking or other purposes. There was evidence that patients do walk within the units and did pass by an area where one of Respondent's managers posted one of Respondent's anti-union flyers. This action by Respondent further contradicts the opinions of Drs. Hammer and Gregory.[72] Keeping in mind medical practices, the role of hospitals and the interests of the patients, the record in this proceeding requires the conclusion, based on the proof presented, that Respondent has failed to justify its ban on solicitation and distribution to employees in these areas. Accordingly, I find the inclusion of these areas in its ban is

---

72. Respondent did not claim or place into evidence any need to ban solicitation and distribution from elevators and stairways. The rule does not ban solicitation and distribution from them and therefore there is no need to make a determination regarding these areas. However, it is noted large waiting areas near the elevators and the hallways adjacent to them were included in the ban. The failure to include the elevators and stairways near these waiting areas is further affirmation there is no need for the rule in these areas outside the units.

overbroad and therefore, is a violation of Section 8(a)(1) of the Act.

Assuming Respondent has demonstrated the waiting areas and corridors outside the units other than those already found herein to be immediate patient care areas, also qualify for that discription, I find the policy is still overbroad becasue it fails to adequately define which areas of its corridors are specifically included in its ban.

4. Admitting and registration areas

Respondent has not presented any evidence concerning the movement of patients to and from admitting and registration areas. There is some evidence a physician may rarely meet a patient at the admitting area, and there is discussion of insurance, a matter admittedly upsetting to patients and their families. General Counsel and Charging Party argue there is no demonstrated need for the ban in these areas. I disagree. When a patient is in these area awaiting admission to the hospitals or treatment, therapy or testing, there is a demonstrated need for them to be shielded from employees engaged in solicitation or distribution. Accordingly, I find the rule is not overbroad concerning the admitting and registration areas. Patients, during admission and registration are asked personal and confidential questions, such as medical histories. Therefore, I conclude admission and registration are part of the process through which patient care is provided and therefore, is part of patient care.

Appendix C

5. Solicitation and distribution to nonemployees

General Counsel and Charging Party claim Respondent's ban on solicitation of and distribution to nonemployees anywhere on its property, including non-working areas is unlawful, because it has failed to establish special circumstances warranting such a broad ban, citing *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), *NCR Corp.*, 313 NLRB 574 (1993), *Payton Packing Co.*, 49 NLRB 828, 843 (1943); *Le Tourneau Co.*, 54 NLRB 1253 (1944); and *Gayfers Department Store*, 324 NLRB 1246 (1997).

In *NCR Corp.*, supra at 576, the Board held:

> The right of employees to distribute union literature during nonworktime and in nonwork areas is not limited to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations.

Charging Party analogized Respondent's ban on activities involving nonemployees to the situation obtaining in *Handicabs, Inc.*, 318 NLRB 890 (1995); enfd. 95 F.3d 681 (8th Cir. 1996); where the Respondent banned employees from: "Discussing complaints or problems about the company with our clients" and made breaking this rule grounds for immediate dismissal. The employer claimed its customers, because of their ages and disabilities, made them similar to hospital patients. The employer discharged an employee for

discussing work-related problems and union activity with passengers. Administrative Law Judge Pannier found:

> To be sure, some words and conduct do cause greater concern for a vulnerable person than is the fact for other individuals. Still any work rules intended to address such greater concerns must be narrowly tailored to avoid unnecessary deprivation of employees' statutory rights.
>
> As a general proposition, employees do not "lose their protection under the 'mutual aid or protection' clause [of section 7 of the Act] when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987). That protection can be lost whenever employee communications to third parties do not relate to labor practices of the employer, such as disparaging the employer's reputation or quality of its product, or whenever those communications are maliciously motivated. See generally *NLRB v. Local 1229 IBEW (Jefferson Standard)*, 346 U.S. 464 (1953). But portions [of the ban] are not limited to those types of communication.

Analogously, Respondent's ban in this case is not limited to the above-described or other unprotected activity. For example, the ban was not limited to comments concerning Respondent's reputation or provision of health care services.

The ban was not confined to areas impacting patient care, it included all of Respondent's property. It did not delineate which leased properties, but included office buildings which are not attached the hospitals.[73] There was no claim any of the Union's actions threatened work stoppages. On the contrary, Respondent distributed materials raising the possibility of work stoppages in its anti-union campaign within the units. Moreover, the concern over strikes was a matter considered by Congress in its amendments to the Act, and the possibility of strikes did not constitute a ground to preclude organizing activity at health care facilities, including hospitals. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

The rule is so broad as to encompass all lawful employees petitioning of public support regardless of where such solicitation or distribution occurs on Respondent's property. As found above, Respondent does not know the boundaries of its leaseholds; its managerial personnel and guards exercised denials of access or attempted to deny access in areas where Respondent does not have a clearly established property interest. The ban clearly bars protected activity throughout the hospitals and other areas defined only as Respondent's property, without establishing a special need for such a broad ban. There was no showing patients would receive such literature outside the hospital buildings or in the cafeterias, gift shops, maintenance or utility areas.

---

73. Respondent admits some offices are rented in buildings that contain other tenants. There is no evidence concerning the need for the ban in all of these remote locations. There is no evidence patients and their families visit all of these areas, including those that customize medical equipment such as wheelchairs.

Appendix C

Employees, absent a showing of special circumstances, are not barred from standing in front of hospitals and handing out literature concerning a labor issue. Respondent has failed to demonstrate the existence of special circumstances in this case.

To the contrary, Respondent permits the nurses' union, CRONA, to post notices on a bulletin board in the lobby of Stanford Hospital. The bulletin board is near the entrance to the cafeteria and accessible to patients, visitors and other nonemployees such as students. Since Crona's posting of its literature inside Stanford Hospital is not deemed adverse to patient care by Respondent, then to bar solicitations by or literature distributed by Charging Party and others is disparate treatment.

In further contrast to its claims of a need for such a broad ban, Respondent's actions in distributing literature raising the potential of strikes in clearly immediate patient care areas such as within the units, indicates it was not concerned with the potential of this kind of literature upsetting patients or believed it would disturb them. This does not mean that I am condoning such activity in patient care areas, but such actions by Respondent dispel any unsubstantiated claim of a need for the ban within any of its leaseholds; inside and outside its hospitals.

In sum, Respondent has failed to meet its burden of demonstrating the need for a complete ban of solicitation and distribution to nonemployees on any of its leaseholds. Respondent has not presented any persuasive evidence such a broad ban is necessary to protect patients. There was not

any evidence the regular leafletting by the Union outside the Hospitals during the organizing campaign prior to the ban, discussed in detail above, had any adverse effect upon patient care. I therefore conclude the ban is overly broad in violation of Section 8(a)(1) of the Act. *Kinder-Care Learning Centers*, 299 NLRB 1171, *Handicabs, Inc.*, supra.

CONCLUSIONS OF LAW

UCSF-Stanford Health Care, an employer engaged in commerce within the meaning of section 2(2), (6) and (7) of the Act, has committed unfair labor practices affecting commerce by excluding and attempting to exclude union organizers from areas it failed to demonstrate it had the appropriate property rights to permit such exclusion; by discriminatorily excluding a union organizer from its property; by promulgating, maintaining and distributing overly broad solicitation and distribution rules forbidding solicitation and distribution in areas not established as patient care areas; and by banning all solicitation and distribution to nonemployees on its premises, in violation of Section 8(a)(1) of the Act.

REMEDY

Having concluded that UCSF-Stanford Health Care has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, take certain affirmative action to effectuate the policies of the Act.

Charging Party seeks as an additional remedy, that Respondent be required to post the Notice, attached as

Appendix C

"Appendix," hereto, in each department of its Hospitals and Clinics and to individually distribute the Notice to each employee. The basis for this request is that Respondent disseminated its overbroad solicitation and distribution policy individually to each employee. Charging Party analogizes the solicitation and distribution of the policy to that of an unlawful rule contained in an employee handbook. Citing *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *Farr Co.*, 304 NLRB 203, 215-216, 257 (1991); *Marriott Corp.*, 313 NLRB 896 (1994); and *Employee Management Services*, 324 NLRB 1051 fn. 3 (1997).

Inasmuch as Respondent must rescind or revise its solicitation and distribution rule so that it is not unlawful, the uncontroverted evidence that employees work staggered shifts and have staggered breaks which are taken in various areas inside and outside of the hospitals, the lack of any evidence all the affected employees use locker rooms or other centralized facilities where only posting of the notice would reach all the employees, and the fact Respondent determined the most efficacious manner of distributing the policy was individually, I conclude there is merit to Charging Party's request and will require Respondent to distribute the notice to all of its employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[74]

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74. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix C

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overbroad solicitation and distribution policy.

(b) Evicting or threatening to evict nonemployee union organizers peacefully handbilling or meeting employeesfrom property surrounding the Hospitals that Respondent has not demonstrated was within its leasehold or met the requirements of the Moscone Act, Cal. Code of Civ. Proc. Sec. 527.3; and, discriminatorily enforcing its access rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify its overbroad access and solicitation and distribution rule which prohibits employees from engaging in solicitation and distribution in areas that have not been shown to be patient care areas and banning all solicitation and distribution to nonemployees on its property; and

(b) Rescind or modify its policy prohibiting nonemployee representatives of Service Employees International Union, Local 715, from engaging in peaceful waiting for employees outside the Hospitals or handbilling with a reasonable number of persons in a manner that does not unduly interfere with the normal use of facilities or operation of the Hospitals.

(c) Within 14 days after service by the Region, post at all places notices to employees are customarily posted and distribute to each employee the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted and individually distributed immediately upon receipt. The posting shall be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed any facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 2, 1994.

(d) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, San Francisco, California December 26, 2000

Appendix C

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate and maintain an overbroad no solicitation and distribution.

WE WILL NOT evict or threaten to evict union organizers peacefully awaiting meetings with our employees or handbilling from property surrounding the Hospitals that Respondent has not demonstrated was within its leasehold or met the requirements of the Moscone Act, Cal. Code of Civ. Proc. Sec. 527.3; and discriminatorily enforce our access rule.

Appendix C

WE WILL NOT in any like or related manner interfere with, restrain or coerce any of you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind or modify our solicitation and distribution rule that prohibits employee to employee solicitation and distribution in areas that are not patient care areas and prohibits all solicitation and distribution to nonemployees.

WE WILL rescind or modify and not discriminatorily enforce our access rules so we do not evict or threaten to evict representatives of Service Employees International Union, Local 715, who are peacefully awaiting meetings with our employees or are picketing and/or handbilling in those areas that are near but not part of our leaseholds, on the outside of Stanford Hospitals and within our leaseholds, provided such activity is consonant with the requirements of the Moscone Act, Cal. Code of Civ. Proc. Sec. 527.3; as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of the Hospitals. If we modify and republish our solicitation and distribution and access rules, we will distribute the modified rules individually to all employees

UCSF STANFORD HEALTH CARE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 30, 2003

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 01-1454

September Term, 2002

Stanford Hospital and Clinics,
Successor to UCSF Stanford Health Care,

Petitioner

v.

National Labor Relations Board,

Respondent

Service Employees International Union, Local 715,

Intervenor

BEFORE: Ginsburg, Chief Judge, and Rogers and Tatel, Circuit Judges

Appendix D

ORDER

Upon consideration of petitioner's petition for rehearing filed June 2, 2003, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Michael C. McGrall
Michael C. McGrall
Deputy Clerk

APPENDIX E — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED MAY 15, 2003

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANFORD HOSPITAL AND CLINICS,
SUCCESSOR TO UCSF STANFORD HEALTH CARE

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

JUDGMENT

Before: GINSBURG, ROGERS, and TATEL, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by Stanford Hospital and Clinics, Successor to UCSF Stanford Health Care, to review an order of the National Labor Relations Board in Board Case Nos. 32-CA-16965 and 32-CA-17092, issued against said Petitioner, its officers, agents, successors, and assigns, on August 27, 2001, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on January 21, 2003, and has considered the briefs and transcript of record filed in this cause. On April 18, 2003, the Court, being fully advised of the premises, handed down its opinion granting enforcement in part of the

Board's Order. In conformity therewith, it is hereby ORDERED AND ADJUDGED by the Court that the Petitioner, Stanford Hospital and Clinics, Successor to UCSF Stanford Health Care, Palo Alto, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Promulgating, maintaining, distributing overlybroad no-solicitation/no-distribution rules.

(b) Evicting, attempting to evict, or threatening to evict union organizers from areas for which the Respondent has no property interest permitting it to evict individuals.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify its overbroad access and solicitation and distribution rule which prohibits employees from engaging in solicitation and distribution in areas that have not been shown to be patient care areas and banning all solicitation and distribution to nonemployees on its property; and

(b) Within 14 days after service by the Region, post at all places notices to employees are customarily posted and distribute to each employee the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted and individually distributed immediately upon receipt.

Appendix E

The posting shall be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed any facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 2, 1994.

(c) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification a responsible official on a form provided by the Region attesting to the steps that Respondent has take to comply.

s/ Douglas Ginsburg
Chief Judge, United States Court of Appeals
For the District of Columbia Circuit

s/ J.W. Rogers
Judge, United States Court of Appeals
For the District of Columbia Circuit

s/ [illegible]
Judge, United States Court of Appeals
For the District of Columbia Circuit

Appendix E

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate, maintain, or distribute overlybroad no-solicitation or no-distribution rules.

WE WILL NOT evict, attempt to evict or threaten to evict union organizers from areas in which we do not have a property interest that permits us to evict individuals.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Appendix E

WE WILL rescind or modify our no-solicitation/no-distribution rules that prohibit employee-to-employee solicitation and distribution in areas that are not immediate patient care areas, and which prohibit all solicitation and distribution by employees to nonemployees.

WE WILL rescind or modify our access rules so we do not evict, attempt to evict, or threaten to evict representatives of Service Employees International Union, Local 715, who are handbilling in those areas that are near our facility but not on our property.

STANFORD HOSPITAL AND CLINICS,
SUCCESSOR TO UCSF STANFORD HEALTH CARE

Supreme Court, U.S.
FILED
DEC 3 _ 2003
OFFICE OF THE CLERK

(4)

No. 03-501

In the Supreme Court of the United States

STANFORD HOSPITAL AND CLINICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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22 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, an acute-care hospital, committed an unfair labor practice by promulgating an overbroad employee solicitation and distribution policy.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 325 F.3d 334. The decision and order of the National Labor Relations Board (Pet. App. 25a-30a) and the decision of the administrative law judge (Pet. App. 31a-237a) are reported at 335 N.L.R.B. 488.

JURISDICTION

The judgment of the court of appeals (Pet. App. 240a-244a) was entered on May 15, 2003. A petition for rehearing was denied on June 30, 2003 (Pet. App. 238a-239a). The petition for a writ of certiorari was filed on September 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees the right "[to] join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 "necessarily encompasses" the right of employees "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978). Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of Section 7 rights.

This Court has upheld the National Labor Relations Board's "general approach" to the regulation of employee solicitation and distribution of literature in health-care facilities. *Beth Israel Hosp.*, 437 U.S. at 507; *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 778-779 (1979). Under that general approach, a health-care facility must permit employee solicitation and literature distribution during nonworking time in nonworking areas of a health-care facility unless the facility justifies a prohibition as necessary to avoid disruption of health-care operations or disturbance of patients. *Beth Israel Hosp.*, 437 U.S. at 507. The Board presumes, however, that a ban on solicitation and distribution in "immediate patient care areas" is justified. See *Baptist Hosp.*, 442 U.S. at 778-779.

2. Petitioner Stanford Hospital and Clinics (Stanford Hospital) is an acute-care medical facility on the campus of Stanford University in Palo Alto, California. Pet.

App. 2a, 4a.[1] Petitioner also operates Lucile Packard Children's Hospital (Children's Hospital), which is physically connected to Stanford Hospital. *Id.* at 2a, 36a. Both hospitals are configured into patient units, which are also called nursing units. *Id.* at 3a, 86a, 135a. The patient units at both hospitals are reached by walking down a hallway and passing through a set of double doors. *Id.* at 3a. Among other things, the patient units contain waiting areas for use by patients, families, and visitors. *Id.* at 3a-4a. Located outside of the patient units are separate waiting areas, which are also for use by patients, families, and visitors. *Id.* at 4a.

In November 1997, Local 715 of the Service Employees International Union, AFL-CIO (Union) began an organizing campaign among approximately 1400 service and maintenance workers employed by petitioner at the hospitals. Pet. App. 3a, 35a, 38a. In response to the campaign, petitioner promulgated and delivered to employees a solicitation and distribution policy designed "[t]o avoid disrupting patient care and to prevent disturbing our patients and their families." *Id.* at 3a; see *id.* at 115a-118a.

Among other things, petitioner's policy prohibited "solicitations and distributions of literature" between employees "at any time in patient care areas." Pet. App. 116a (the employee-to-employee no-solicitation/no-distribution rule). Petitioner defined "patient care areas" to include, among other locations, all "waiting rooms [and] lounges used by patients and their families or visitors." *Id.* at 3a, 118a. Petitioner's policy also prohibited employees from engaging in "solicitation of or

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[1] Petitioner is a successor to UCSF Stanford Health Care, which was the respondent employer in the administrative proceedings before the Board. See Pet. App. 4a, 28a.

distribution of literature to nonemployees * * * at all times on [petitioner's] property." *Id.* at 117a (the employee-to-nonemployee no-solicitation/no-distribution rule).

3. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by promulgating the employee solicitation and distribution policy. Pet. App. 32a.

After a hearing, an administrative law judge (ALJ) sustained that allegation in pertinent part. Pet. App. 195a-198a, 215a-232a. The ALJ concluded that the employee-to-employee no-solicitation/no-distribution rule is presumptively lawful with respect to the patient units, including the waiting areas in those units, because those areas are "immediate patient care areas." *Id.* at 195a-196a. The ALJ concluded that the rule is not presumptively valid, however, with respect to the waiting areas outside of the patient units. The ALJ further concluded that the rule is overbroad with respect to those areas because petitioner did not establish that it is justified by the potential effect of solicitation and distribution in those areas on the delivery of health care. See *id.* at 196a, 198a, 226a-227a.

In reaching that conclusion, the ALJ considered the testimony of four witnesses presented by petitioner. See Pet. App. 121a-128a, 130a-134a, 137a, 140a-151a, 159a-160a, 199a-208a. The thrust of their testimony was that patients and family members are disturbed by any employee conversations or activities that are unrelated to patient care. See *id.* at 122a, 124a, 140a-143a, 149a, 150a, 216a, 219a; see also *id.* at 8a, 134a-135a n.53, 137a. The ALJ, however, declined to credit fully the testimony of petitioner's witnesses. She found that petitioner permitted employees to discuss controversial

subjects in the waiting areas outside of the patient units and did not "adduce any evidence that conversations concerning union or other solicitations are more disruptive or harmful to patient care" than the "permitted conduct." *Id.* at 216a.

The ALJ also noted that petitioner produced "no specific evidence" that the waiting areas outside of the patient units at Stanford Hospital are all "used by patients or their families." Pet. App. 217a. Even "[a]ssuming some use by patients or their families of some of these rooms," the ALJ found that petitioner did not establish "the frequency of such use or the relation to immediate patient care." *Ibid.* The ALJ noted the lack of evidence that patients or visitors "use[] these areas after 8 p.m. when visiting hours ended at Stanford Hospital" (*ibid.*) and observed that petitioner presented no evidence about "the frequency of patients using * * * waiting areas outside the [patient] units to walk as part of their recovery regimen or otherwise." *Id.* at 221a.

The ALJ also relied on petitioner's failure to produce evidence of "complaints generated by its employees[']solicitation and distribution activities." Pet. App. 224a. Although petitioner annually receives approximately 1200 written complaints from patients at Stanford Hospital and 300 such complaints at Children's Hospital, the ALJ found that "few, if any, involve employee solicitation or distribution." *Id.* at 61a, 119a.

The ALJ also found that the employee-to-nonemployee no-solicitation/no-distribution rule is overbroad. Pet. App. 232a. The ALJ noted that the rule is "not confined to areas impacting patient care" but instead "include[s] all of petitioner's property," including "office buildings" in "remote locations." *Id.* at 230a & n.73. The ALJ found that petitioner made no showing that

patients would receive union literature "outside the hospital buildings or in the cafeterias, gift shops, maintenance or utility areas." *Ibid.* The ALJ found that petitioner did not present "any persuasive evidence [that] such a broad ban is necessary to protect patients." *Id.* at 231a. Based on those considerations, the ALJ concluded that petitioner had not demonstrated "special circumstances" that would justify "the need for a complete ban of solicitation and distribution to non-employees" on all of its property. *Ibid.*

With some modifications not relevant here, the Board affirmed the ALJ's findings and conclusions. Pet. App. 26a-27a. The Board ordered petitioner to cease and desist from promulgating, maintaining, and distributing "overly broad no-solicitation/no-distribution rules," and to "[r]escind or modify" the two rules that were found to be overbroad. *Id.* at 28a, 234a.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia Circuit. Pet. App. 1a. The court denied the petition for review in relevant part and enforced the Board's order. *Id.* at 2a.

The court first addressed the overbreadth of the employee-to-employee no-solicitation/no-distribution rule. Pet. App. 8a. The court noted that, to justify the rule's coverage of the waiting areas outside the patient units, petitioner "need demonstrate only 'a likelihood of, not actual, . . . [patient] disturbance.'" *Ibid.* (quoting *Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003)). The court concluded that "substantial evidence supports the Board's decision that [petitioner] did not meet even this standard" and that the rule is therefore overbroad with respect to the waiting areas outside of the patient units. *Ibid.* (quoting *Brockton Hosp.*, 294 F.3d at 104).

In so concluding, the court cited "three particularly persuasive elements of the ALJ's analysis" (Pet. App. 8a): (1) the ALJ's "doubts" about the credibility of petitioner's witnesses (*id.* at 13a; see *id.* at 8a-10a); (2) the ALJ's finding that petitioner failed to show that patients used all of the waiting areas outside of the patient units (*id.* at 13a; see *id.* at 10a-12a); and (3) the ALJ's finding that "few if any complaints received by the hospital[s] during the organizing campaign involved solicitation and distribution activities" (*id.* at 13a; see *id.* at 12a). The court concluded that "these three aspects of the ALJ's decision * * * are more than sufficient to support the Board's conclusion that [petitioner] failed to demonstrate that solicitation and distribution activities directed at fellow employees outside patient units were likely to disturb patients." *Id.* at 13a.

The court next upheld the Board's determination that the employee-to-nonemployee no-distribution/no-solicitation rule is also overbroad. See Pet. App. 15a-20a. The court explained that, apart from the location of the activity, "NLRA sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees." *Id.* at 16a. The court then inquired whether "the fact that the solicitation and distribution activities took place on the employer's property give[s] rise to countervailing employer interests that outweigh employee section 7 rights." *Id.* at 18a (applying *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978)).

The court answered that question in the negative. See Pet. App. 18a. The court explained that petitioner contended that "its employees' right to solicit nonemployees is outweighed by the need to 'respect . . . the privacy and sensitivity of patients.'" *Ibid.* (quoting Pet. C.A. Br. 16). "For essentially the same reasons"

that it had concluded that petitioner had "failed to establish a likelihood of patient disturbance that could justify its more limited ban on solicitation of fellow employees," the court also concluded that petitioner "failed to demonstrate that its interest in patient privacy and well-being outweighs its employees' section 7 rights to solicit nonemployees." *Ibid.*

The court rejected petitioner's contention that, "even if section 7 allows solicitation of nonemployees" as a general matter, employees "may not exercise such rights in hospitals." Pet. App. 19a. For that contention, the court noted, petitioner cited this Court's statement in *Beth Israel Hospital* that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." *Ibid.* (quoting *Beth Israel Hosp.*, 437 U.S. at 503 n.23). The court explained, however, that "[t]his statement * * * is dicta, for the question before the *Beth Israel Hospital* Court had nothing whatsoever to do with employer authority to restrict solicitation of nonemployees." *Ibid.* "Equally important," the court added, "nothing in *Beth Israel Hospital* suggests that the Court intended to sanction hospital rules that prohibit solicitation and distribution activities unlikely to affect patients or patient care." *Id.* at 19a-20a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. Petitioner first contends (Pet. 10-12) that the court of appeals erred in holding that petitioner's employee-to-nonemployee no-solicitation/no-distribution

rule is overbroad. In support of that contention, petitioner asserts that the court's holding means that a hospital cannot enact a rule that "prohibit[s] its employees from soliciting patients and their families on hospital grounds." Pet. 10; see Pet. i (Question 1), 8. That assertion is, however, based on a mischaracterization of petitioner's rule and the court of appeals' decision.

Contrary to petitioner's suggestion, petitioner did not promulgate, and the court of appeals did not address, a rule prohibiting employees from soliciting and distributing literature to *patients and their families.* Rather, petitioner promulgated, and the court held overbroad, a significantly broader rule prohibiting employees from soliciting and distributing literature to all "*nonemployees*" anywhere on hospital property. Pet. App. 2a, 3a, 15a-20a; see *id.* at 117a (quoting petitioner's policy, which stated that "[s]olicitation of or distribution of literature to nonemployees is prohibited at all times on [petitioner's] property"). "Nonemployees" include many individuals other than patients and their families. For example, persons who deliver goods to the hospitals, who attend continuing medical education programs at the hospitals (see *id.* at 101a), or who take tours of the facilities (*id.* at 102a-104a) are encompassed by petitioner's solicitation and distribution ban but would not be covered by a more narrowly tailored ban directed at only patients and their families. Moreover, because petitioner's rule is effective anywhere "on [its] property," the rule applies to many locations where patients and their families are unlikely to be present, for example, the maintenance and utility areas of the hospitals. See *id.* at 230a.

As the court of appeals correctly recognized, on the record developed in this case, petitioner failed to

demonstrate that its blanket ban of all solicitation of and distribution of literature to all nonemployees is necessary to advance its legitimate interest in protecting the privacy and well-being of patients. See Pet. App. 15a-18a, 228a-232a. Notably, in framing its judgment, the court of appeals (like the Board) permitted petitioner to advance its legitimate interests by making appropriate modifications to its overbroad rule. See *id.* at 241a; see also *id.* at 28a, 234a. Thus, for example, nothing in the judgment of the court of appeals or the Board's order forecloses petitioner from adopting a rule prohibiting solicitation of patients and their families on hospital grounds. Because of the limited and fact-bound nature of the court of appeals' actual holding, this Court's review is not warranted.

Petitioner's amici American Hospital Association and Association of American Medical Colleges (AHA/AAMC) also misread the court of appeals' decision. Amici incorrectly contend that the decision "permits direct solicitation of patients, their families, and friends" (Br. 2) and "creates a presumption" that "patients will experience no detrimental effects from *direct* solicitations and distributions simply because they occur outside of narrowly defined patient-care areas" (Br. 7-8). Contrary to those contentions, the court of appeals' decision does not authorize solicitation of patients, their families, and friends on hospital property. Nor does the decision create any new "presumption," much less the presumption described by amici. Rather, as explained above, the court held only that, on the record in this case, petitioner failed to justify a blanket prohibition on solicitation of and distribution of literature to *all nonemployees anywhere on hospital property*—which is materially broader than a ban on solicitation of or distribution of literature to patients

and their visitors. Apart from their claims based on their misconstruction of the court's opinion, amici (like petitioner) do not contend that the court applied an improper analytical framework in reaching that fact-bound determination.

b. Petitioner and AHA/AAMC also contend (Pet. 8, 10; Amici Br. 5-6) that, in *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978), this Court authorized hospitals to promulgate blanket bans on solicitation of and distribution of literature to all nonemployees. That contention lacks merit.

Petitioner and AHA/AAMC premise that argument entirely on the Court's statement in a footnote in *Beth Israel Hospital* that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." 437 U.S. at 503 n.23. But the court of appeals' conclusion that petitioner's employee-to-nonemployee no-solicitation/no-distribution rule is overbroad is consistent with this Court's approving reference to "a rule forbidding any distribution to or solicitation of nonemployees." *Ibid.* The Court was evidently referring to a rule of the type promulgated by the hospital in that case, which provided that "[t]here is to be no soliciting of the general public (*patients, visitors*) on Hospital property." *Id.* at 486 (emphasis added); see *id.* at 503 n.23 (explaining that "[p]etitioner, in fact, has such a rule"). As described above, this case involves a materially broader rule, which is not limited to solicitation and distribution directed at patients and visitors but prohibits solicitation and distribution directed at *all* nonemployees, a category that also encompasses delivery persons and individuals attending continuing medical education programs at the hospitals. See p. 9, *supra*.

c. Petitioner further errs in contending (Pet. 12) that the court of appeals required petitioner to demonstrate an "actual adverse effect" on patient care in order to justify its employee-to-nonemployee no-solicitation/no-distribution rule. On the contrary, the court of appeals expressly stated that petitioner had to demonstrate only a "likelihood of, not actual," disturbance to patients. Pet. App. 8a; see *id.* at 18a. That test fully accords with this Court's precedent. See *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 781 n.11 (1979) (relevant inquiry is whether solicitation is "likely" to disrupt patient care or disturb patients); *Beth Israel Hosp.*, 437 U.S. at 500 (relevant inquiry is whether patient care is "likely" to be disrupted).

Petitioner mistakenly objects (Pet. 12) to the court of appeals' reliance on an ALJ finding that "regular leafleting" by the Union outside the hospitals had not resulted in "any adverse effect upon patient care." Pet. App. 19a; see *id.* at 231a-232a. The court of appeals' consideration of that ALJ finding is also fully consistent with this Court's precedent. See *Beth Israel Hosp.*, 437 U.S. at 502 (finding it "especially telling" that limited solicitation in the cafeteria for a significant period of time had occurred "without untoward effects" on patient care).

d. Petitioner incorrectly seeks (Pet. 11-12) to support its employee-to-nonemployee no-solicitation/no-distribution rule by relying on Board precedent approving no-solicitation rules in retail stores. See also AHA/AAMC Amici Br. 9 (making similar argument). There is no merit to that contention. The Board permits retail stores to prohibit employee-to-employee solicitation on the selling floor, and in restaurants within retail stores where customers and employees are in "close contact," because, in those circumstances, the

employees' activity is "as apt to disrupt the [retail store's] business as is such solicitation carried on in any other portion of the store in which customers are present." *Goldblatt Bros.*, 77 N.L.R.B. 1262, 1263-1264 (1948). That principle, however, is inapposite where, as here, the no-solicitation rule is overbroad. As discussed above, petitioner's rule operates everywhere on petitioner's property, not just in locations where patients and their visitors are likely to be present.

2. Petitioner also challenges (Pet. 13-15) the court of appeals' conclusion that petitioner's employee-to-employee no-solicitation/no-distribution rule is overbroad to the extent that it includes waiting areas located outside of the patient units. Petitioner contends (Pet. 13) that this Court should resolve an issue "left undecided" in *Baptist Hospital* and hold that the Board's definition of "immediate patient care areas" is irrational because it does not include "nearby waiting areas where patients and their families receive medical advice and counseling." That issue is not properly before this Court, however, and petitioner's claim that the Board's interpretation is irrational does not warrant review in any event.

a. Although petitioner now contends that the Board's definition of "immediate patient care areas" is irrational (see Pet. 13-15), petitioner failed to raise that contention before the Board. Petitioner has alleged no "extraordinary circumstances" excusing its failure to do so. Therefore, petitioner is jurisdictionally barred from raising its claim in this Court. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

Moreover, this case does not present the issue framed by petitioner, *i.e.*, whether immediate patient care areas must rationally include "nearby waiting areas where patients and their families receive medical advice and counseling." Pet. 13. The waiting areas located outside of the patient units at petitioner's hospitals have not been shown in this case to be locations where "patients and their families receive medical advice and counseling." Rather, as both the Board and the court of appeals found, petitioner did not demonstrate that patients and their families actually make use of all the waiting areas outside of the patient units. Nor did petitioner establish that, to the extent that some patients and their family members use some of those waiting areas, the usage involves the delivery of patient care during all hours of the day and night, when petitioner's rule was operative. See Pet. App. 10a, 217a, 221a.[2]

b. In any event, petitioner's challenge to the validity of the Board's definition of "immediate patient care areas" is based on a mischaracterization of the Board's current definition, which is materially different from the definition in effect when this Court decided *Baptist Hospital*. As petitioner notes (Pet. 13), the Board's definition at that time was limited to patients' rooms, operating rooms, and treatment rooms. See *Baptist*

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[2] See also Pet. App. 222a (ALJ's finding that the medical staff at Children's Hospital does not discuss "sensitive material" with families in the waiting areas outside the patient units); *id.* at 222a-223a (ALJ's finding that, although the employee-to-employee no-solicitation/no-distribution rule applies "twenty-four hours a day, seven days a week," there are times during the day when there is "little or no use" of the waiting areas outside the patient units "by medical care professionals meeting with patients or their families, or by patients and their families or other visitors").

Hosp., 442 U.S. at 780-781 & 781 n.10 (discussing *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), enforced in part, 557 F.2d 1368 (10th Cir. 1977)). The Court in *Baptist Hospital* expressed "serious doubts" about the Board's initial definition. See 442 U.S. at 789. Contrary to petitioner's implication that the Board did not respond to the Court's concerns, the Board broadened its definition after the decision.

Based on "further experience with hospital no-solicitation rules," the Board extended its definition of "immediate patient care areas" to include "halls and corridors adjacent to" immediate patient care areas (*Central Solano County Hosp. Found., Inc. (Intercommunity Hosp.)*, 255 N.L.R.B. 468, 472 (1981)) and waiting rooms adjacent to immediate patient care areas (see *Doctors' Hosp. of Staten Island, Inc.*, 325 N.L.R.B. 730, 735 (1998)). Moreover, the Board readily concludes that hospitals have justified prohibitions on solicitation in other locations. See, *e.g.*, *Presbyterian/St. Luke's Med. Ctr.*, 258 N.L.R.B. 93, 98 (1981) (hallways, elevators, and stairways "utilized for the movement of patients and emergency equipment"), enforced, 723 F.2d 1468 (10th Cir. 1983); *Intercommunity Hosp.*, 255 N.L.R.B. at 473 (lobby and waiting room "used by staff to take medical histories and for conferring with the family and friends of patients"). Likewise, the court of appeals has not been reluctant to decline to enforce Board decisions invalidating solicitation bans when the record reflects the potential for disrupting patients and visitors. See, *e.g.*, *Baylor Univ. Med. Ctr.* v. *NLRB*, 662 F.2d 56 (D.C. Cir. 1981) (remanding for reconsideration of Board decision invalidating ban on solicitation in cafeteria). In light of these decisions, petitioner is unpersuasive in contending (Pet. 13) that patient well-being can be

protected only by further expanding the Board's definition of "immediate patient care areas."

Petitioner also argues (Pet. 15-16) that the evidence in this case indicates that there are no differences between the waiting areas outside of the patient units and those inside the patient units that justify treating solicitation and distribution differently in the two types of areas. That fact-bound contention does not warrant this Court's review and is, in any event, unpersuasive.[3]

3. Finally, petitioner contends (Pet. 17-18) that this Court should resolve an issue "left undecided" in *Beth Israel Hospital* and hold in this case that the Board must consider "the availability of other areas of the hospital for solicitation and organizational activity" in determining whether a hospital may prohibit employee-to-employee solicitation in a particular area. Petitioner did not raise that claim before the court of appeals, however, and the court did not address it. The claim is therefore not properly preserved for review by this

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[3] For example, petitioner contends (Pet. 15-16) that employees routinely eat meals in day rooms located inside the patient units, and sometimes eat in the waiting areas outside of the patient units. As the ALJ found, however, notwithstanding some employee use of the day rooms for such purposes, those rooms are "clearly * * * used by patients and their families to visit and are overseen by the staff for patient care." Pet. App. 196a. The same is not true of the waiting areas outside of the patient units. See *id.* at 10a, 217a (finding by ALJ and court of appeals that petitioner did not establish that patients and their families use all the waiting areas outside of the patient units or that any usage is related to patient care). Furthermore, petitioner's claim that the uses of the two types of waiting areas are similar is inconsistent with the ALJ's finding that petitioner permitted employees to use the waiting areas outside of the patient units "for all purposes other than solicitation and distribution," including parties, craft sales, and bake sales. *Id.* at 225a.

Court. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993).

In any event, the claim lacks merit. In deciding whether the hospital in *Beth Israel Hospital* had justified a ban on employee-to-employee solicitation and distribution in the cafeteria, this Court indicated that "the availability of one part of a health-care facility for organizational activity *might* be regarded as a factor to be considered in evaluating the permissibility of restrictions in other areas of the same facility." 437 U.S. at 505 (emphasis added). The Court did not suggest, however, that the Board must consider that factor in every case; rather, the Court noted that, in some cases, that consideration may be "inapposite." *Ibid.* The Board and the courts of appeals have since concluded that the availability of alternative areas for employee organizational activity is of "marginal importance" when, as in this case, the hospital has not demonstrated that permitting organizational activity in the area in which that activity is restricted would likely have a detrimental impact on patient care. See *Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 105 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003); *NLRB* v. *Southern Md. Hosp. Ctr.*, 916 F.2d 932, 936 (4th Cir. 1990) (per curiam). Petitioner offers no reason to question that conclusion.

Moreover, even considering petitioner's proposed alternative locations, its argument that employee-to-employee solicitation should not be permitted in the waiting areas outside of the patient units is unpersuasive in the absence of a showing that such solicitation would likely have a detrimental impact on patient care. Although petitioner asserts (Pet. 18) that employees have adequate opportunity to solicit other employees in hos-

pital cafeterias and employee break rooms, petitioner has not offered facts establishing that those locations are a "natural gathering are[a]" for the hospitals' approximately 7000 employees, including the 1400 service and maintenance workers that the Union was seeking to organize here. *Beth Israel Hosp.*, 437 U.S. 505; see Pet. App. 2a. Cf. *Beth Israel Hosp.*, 437 U.S. at 490 (noting that 77% of the hospital cafeteria's patrons were employees); *St. John's Hosp. & Sch. of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368, 1375 (10th Cir. 1977) (noting stipulation that at least 80% of the employees used an employee-only lunchroom and cafeteria on a daily basis) (cited at Pet. 18).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-501

IN THE

Supreme Court of the United States

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

PETITIONER'S REPLY BRIEF

In its brief in opposition, the National Labor Relations Board ("Board") raises several new points:

1. The Board argues that because the court of appeals "permitted petitioner to advance its legitimate interests by making appropriate modifications to its overbroad rule," the court of appeals' holding is "limited and fact-bound." Brief for the National Labor Relations Board in Opposition ("Brief in Opp."), p. 10. That ignores the sweeping legal conclusion of the court of appeals that "neither this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and nonemployees." Pet. App. 16a. This broad statement of law potentially requires employers to allow solicitation of nonemployees everywhere that solicitation of employees is permitted. It will have a profound impact on the future ability of hospitals to prohibit solicitations by employees that are likely to interfere with patient care.

2. The Board erroneously asserts that "[a]lthough petitioner now contends that the Board's definition of 'immediate patient care areas' is irrational (*see* Pet. 13-15), petitioner failed to raise that contention before the Board." Brief in Opp., p. 13. In fact, petitioner raised its contention in its brief before the Board. *See* Brief of the Respondent (filed with the Board on Jan. 28, 2000), pp. 54-59. Petitioner specifically argued:

> In *Baptist Hospital*, the Supreme Court recognized that "a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simply classification. Patients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-

> care units, patients' rooms, wards, sitting rooms, and even the corridors, where patients often are encouraged to walk, or to visit with their families. In different hospitals, the use and physical layout of such a variety of areas may require varying resolutions of questions about the validity of bans on union solicitation [and] in discharging its responsibilities for administration of the Act, the Board must frame its rules and administer them with careful attention to the wide variety of activities within the modern hospital."

Id., pp. 57-58.

The Board portrays its decision as if there was merely a factual determination that "petitioner did not demonstrate that patients and their families actually make use of all the waiting areas outside of the patient units." Brief in Opp., p. 14. The Board decided that a rule which prohibited solicitation in "lounges used by patients and their families or visitors" (App. 118a) is overbroad. Such a rule should be presumptively valid because, on its face, it is addressed to "patient care" areas. Petitioner squarely argued to the Board that hospital patients should be protected "from exposure to solicitation in areas in which patients and their visitors maybe, and wherein patient care—however infrequent—may take place." Brief of the Respondent, pp. 58-59.

3. The Board also erroneously asserts that petitioner did not raise before the court of appeals its argument that the Board should consider the availability of other areas of the hospital for solicitation and organizational activity. Brief in Opp., p. 16. Again, the Board is wrong. Petitioner argued in the court of appeals that petitioner's "position seems particularly compelling

in light of the many alternative venues for such communication available to its employees under [petitioner's] policy—including dedicated employee break rooms located inside these very same nursing units!" Brief of Petitioner Stanford Hospital and Clinics, successor to UCSF Stanford Health Care (filed in Court of Appeal on Sept. 20, 2002), p. 35 n.21.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-501

IN THE

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OCTOBER TERM, 2003

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE AMERICAN HOSPITAL ASSOCIATION AND ASSOCIATION OF AMERICAN MEDICAL COLLEGES IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

No. 03-501

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE AMERICAN HOSPITAL ASSOCIATION AND ASSOCIATION OF AMERICAN MEDICAL COLLEGES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The American Hospital Association (AHA),[1] founded in 1898, is the national advocacy organization for hospitals in

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[1] In accordance with Rule 37.6 of the Court, counsel represents that no part of this brief was authored by counsel

this country. It represents approximately 5,000 hospitals, health systems, networks, and other care providers. AHA's mission is to promote high quality patient care through leadership and representation of, and service to, healthcare provider organizations committed to meeting the healthcare needs of their communities.

The Association of American Medical Colleges (AAMC), founded in 1876, represents the nation's 126 medical schools, nearly 400 major teaching hospitals, and their administrative leadership; faculty in academic and scientific societies; and medical students and residents. AAMC's mission is to improve public health by enhancing the effectiveness of academic medicine. It supports its members in carrying out their responsibilities for education, research, development, and the provision of patient-care services in academic settings.

Hospitals are dedicated to protecting and promoting the physical and emotional well-being of patients. Doing so requires that hospitals adopt policies and procedures to protect and promote patient safety, quality of care, individual privacy and other aspects of care and treatment essential to achieve their mission. That is why amici are concerned about the implications of the D.C. Circuit's holding that a hospital cannot "prohibit[] its employees from . . . soliciting and distributing materials to . . . all nonemployees throughout the hospital." Pet. App. at 2a. The decision effectively permits direct solicitation of patients, their families, and friends by employees or anyone else on hospital premises. It will impair amici's member hospitals' ability to protect and promote

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for a party and that no person or entity other than amici made any monetary contribution to the preparation or submission of this brief.

essential aspects of care, including, as described by Justice Brennan in *Beth Israel Hospital* v. *National Labor Relations Board*, 437 U.S. 483 (1978), "tranquil" patient-care settings. *Id.* at 495 (quoting *St John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150, 1150 (1976)).

This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

As this Court and the National Labor Relations Board long ago recognized, hospitals have a compelling interest in providing patients, their families, and friends with an environment conducive to the highest quality medical care. Because of hospitals' patient-care mission, the law is clear that even solicitation and distribution *among employees themselves* are presumptively harmful and may be completely banned in areas of a hospital where patients are most likely merely to witness such activities. It necessarily follows that any *direct* solicitation of or distribution to patients -- which can be far more intrusive -- can be proscribed for the same reasons, regardless of where it occurs on a hospital's premises.

The D.C. Circuit decision undermines hospitals' ability to provide an environment conducive to the highest quality medical care by failing to allow hospitals to determine that it is in patients' best interests for employees not to solicit or distribute literature to them, their families, or friends. When there are so many other outlets that afford employees access to the general public and that do not have the potential to affect patient care, the court's holding that employee solicitations of and distributions to patients are presumptively not disturbing to the patient-care environment seems particularly inapt. That presumption also is contrary to the

Board's own precedents. In the best interests of patients, hospitals must be allowed to retain the flexibility to adopt rules prohibiting such activities on all or some of their premises so long as the rules are rational and consistently applied.

ARGUMENT

THE D.C. CIRCUIT'S HOLDING THAT HOSPITALS CANNOT PROHIBIT THEIR EMPLOYEES FROM DIRECTLY SOLICITING PATIENTS, THEIR FAMILIES, AND FRIENDS COULD UNDERMINE PATIENT CARE AND IS CONTRARY TO PATIENTS' BEST INTERESTS AND SETTLED LAW

A. HOSPITALS HAVE A COMPELLING INTEREST IN PROVIDING THE HIGHEST QUALITY MEDICAL CARE

Twenty-five years ago this Court recognized that " 'the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.' " *Beth Israel,* 437 U.S. at 495 (quoting *St. John's Hosp.*, 222 N.L.R.B. at 1150). That is so because:

> "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family -- irrespective of whether that patient and that family are labor or *management* oriented -- need a restful, uncluttered, relaxing, and helpful atmosphere, rather than

> one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." [*NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 772, 783 n.12 (1979) (quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment) (emphasis in original).]

In *Beth Israel* the Court concluded that hospitals' patient-care focus justified the NLRB's adoption of a unique set of rules to govern employee solicitation and distribution policies in healthcare institutions. Under these rules, a hospital may ban all solicitation in "strictly patient care areas," including employee-to-employee communications, because any solicitation or distribution in those areas is presumptively unsettling to patients. In all other areas the hospital must show that the solicitation or distribution is likely to disrupt patient care or disturb patients. *Beth Israel*, 437 U.S. at 495.

At the same time that it approved the foregoing rules, the Court also made clear that hospital policies forbidding employee solicitation of and distribution to *nonemployees* are permissible, regardless of where those activities occur on a hospital's premises. *See id.* at 503 & n.23 (stating that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients" and suggesting such a rule as a "less restrictive means . . . more nearly directed toward the harm to be avoided" than banning all organizational activity in a cafeteria predominantly serving employees).

The rules approved in *Beth Israel* have been in effect for a quarter of a century. To protect patients' healthcare interests, including their privacy interests, and to balance those interests with employees' Section 7 rights (29 U.S.C. § 157), amici's member hospitals have adopted solicitation and distribution policies that are carefully tailored to the unique

circumstances of each hospital's setting. Some permit only a few limited exceptions, such as an annual United Way drive or other occasional charitable fundraisers. Others are even more restrictive and prohibit even such seemingly innocuous activities as Girl Scout cookie sales.

Hospital solicitation and distribution policies typically cover employee-to-employee, employee-to-nonemployee, non-employee to employee, and nonemployee-to-nonemployee activities. Some hospitals, like Stanford, have provisions such as the rule endorsed in *Beth Israel's* footnote 23 explicitly prohibiting employees from soliciting or distributing materials to nonemployees or patients. It is these rules that the D.C. Circuit's decision calls into question.

B. HOSPITALS' COMPELLING INTEREST IN PATIENT CARE JUSTIFIES GIVING THEM THE FLEXIBILITY TO PROHIBIT EMPLOYEES FROM SOLICITING OR DISTRIBUTING MATERIALS TO PATIENTS AND VISITORS

It is because of hospitals' patient-care mission that the NLRB's rules governing hospital solicitation and distribution policies are already different from those governing other employers. The Board has determined -- with this Court's approval -- that hospitals can forbid employees from soliciting or distributing to other employees in patient-care areas because of the likelihood that merely witnessing such activity " 'might be upsetting to the patients.' " *Beth Israel*, 437 U.S. at 495 (quoting *St. John's Hosp.* at 1150). It necessarily follows from this reasoning that hospitals should also be able to prohibit employees from *directly* soliciting or distributing materials to patients -- by definition a far more intrusive experience. This is clearly why the *Beth Israel* Court endorsed "a rule forbidding any distribution to or

solicitation of nonemployees" as a "less restrictive" means of balancing patients' privacy and employees' speech interests in a nonpatient-care setting, where all solicitation and distribution activities are not automatically prohibited. *Id.* at 503 n.23. *See also Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (citing footnote 23 with approval); *A.W. Schlesinger Geriatric Ctr., Inc.*, 263 N.L.R.B. 1337, 1341 (1982) (same).

In holding that a hospital cannot prohibit its employees from soliciting and distributing materials to nonemployees throughout its premises, the D.C. Circuit gave inadequate weight to hospitals' interest in protecting and promoting patient care and treatment, the importance of which "cannot be gainsaid." *Beth Israel*, 437 U.S. at 505. At the same time, the court failed to recognize that prohibitions on employee-to-nonemployee solicitation and distribution interfere only minimally with hospital employees' Section 7 rights. When not in the hospital setting, patients, their families, and friends (who constitute the vast majority of nonemployees on a hospital's premises each day) are no different from any other members of the public whose support employees might seek to solicit. There are ample other outlets for securing public support (including the media) that would not impinge on patient care. And employees, of course, remain free to communicate with other employees in nonpatient-care areas. Given these alternative avenues of communication, a prohibition on employee-to-nonemployee solicitation and distribution is not an unreasonable restriction on employees' Section 7 rights. *See id.* ("availability of alternative means of communication" may be important factor in hospital solicitation cases).

To be sure, the D.C. Circuit ruling does not invalidate all hospital prohibitions on employee-to-nonemployee solicitations and distributions beyond immediate patient-care areas. Rather, it creates a *presumption* that such activities will not disturb patients or disrupt patient care. Pet App. at

19a. But presumptions cannot stand when they are not rational, are inconsistent with sound public policy, or do not comport with common sense. *See Beth Israel*, 437 U.S. at 493 (validity of Board's presumptions " 'depends upon the rationality between what is proved and what is inferred' " (quoting *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 805 (1945)). *See also, e.g., United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 174 (1993) (presumptions must be " 'supported by considerations of fairness, public policy, and probability, as well as judicial economy' " (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988)). The presumption sustained by the D.C. Circuit passes none of these tests.

In both *Beth Israel* and *Baptist Hospital*, this Court expressed serious reservations about the propriety of the Board's presumption that patient care is unlikely to be affected by employee-to-employee solicitation and distribution activities in nonpatient-care areas. *Baptist Hosp.*, 442 U.S. at 789-790; *Beth Israel*, 437 U.S. at 508. This Court should be even more troubled by the Board's and the D.C. Circuit's presumption that patients will experience no detrimental effects from *direct* solicitations and distributions simply because they occur outside of narrowly defined patient-care areas. Patients, their families, and friends can be deeply involved in the most critical aspects of care in virtually any area of the hospital and at any time before, during and after the course of treatment. And expert testimony should not be required to prove that patients presented with views critical of the hospital can become so distraught that the success of their treatment is adversely affected. *See, e.g., Baptist Hosp.*, 442 U.S. at 783 (upholding hospital solicitation rule where medical witnesses testified that "psychological attitudes [of patients] play a good part . . . in determining the success of their treatment"; and that if a patient sees employees have their minds on something other

than patient care, "this is very disruptive to the patient and sometimes affects the patient's ability to recover").

Each hospital understands its unique mix of patients and the ways in which those patients and their families and friends use the hospital's premises. To serve their patients' best interests, hospitals must have the flexibility to adopt rules prohibiting employee solicitation and distribution of materials to patients, families, and friends on all or some of the hospital premises. Hospital policies barring employee solicitation of and distribution to nonemployees should not concern the NLRB so long as those rules are not applied in a discriminatory fashion. *Cf. 6 West Ltd. Corp.* v. *NLRB*, 237 F.3d 767, 780 & n.18 (7th Cir. 2001) ("A restaurant in the United States of America should be free to prohibit solicitations on the premises that interfere with or bother employees or customers, and allow those solicitations which neither interfere with nor bother employees or customers" so long as rules are enforced without discrimination).

Finally, as a matter of public policy it is unreasonable to conclude, as the Board and D.C. Circuit have concluded, that hospitals may not prohibit employees from soliciting patients, families, and friends outside of narrowly prescribed areas on their premises, but that restaurant and retail shop owners are free to prohibit solicitation of customers because such solicitation is "apt to . . . disrupt business." *Goldblatt Bros. Inc.*, 77 N.L.R.B. 1262, 1264 (1948). The interests of patients in America's hospitals deserve *more*, not less protection than those of restaurant and retail customers. *See Beth Israel*, 437 at 508 ("There is, of course, a certain irony when the Board grants protection from solicitation to the retail store and to the Burger Chef and the Hot Shoppe cafeteria, but at the same time denies it to the hospital restaurant facility where far more than mere commercial interests are at stake" (Blackmun, J., concurring in judgment)).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, amici respectfully urge this Court to grant the Petition for a Writ of Certiorari with respect to the question of employee-to-nonemployee solicitation and distribution.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

The HR Policy Association respectfully submits this brief *amicus curiae* with the consent of the parties.[1] The brief supports the petition of Stanford Hospital and Clinics urging

[1] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. A letter of consent from counsel for each party has been filed with the Clerk of the Court.

this Court to issue a writ of certiorari to review the decision of the court of appeals in *Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, *reh'g denied*, ___ F.3d ___ (D.C. Cir. 2003).

INTEREST OF THE *AMICUS CURIAE*

The HR Policy Association (the Association) is an organization representing the senior human resource officers of more than 200 of the nation's largest private sector companies. Collectively, its members employ nearly 13 million Americans, more than 12 percent of the U.S. private sector workforce. Since the Association's founding in 1939, its principal mission has been to ensure that laws and policies affecting human resources, including labor relations, are sound, practical and responsive to the realities of the modern workplace.

All of the Association's members are employers subject to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* A number of them operate health care facilities and, thus, have a direct interest in the extent to which the NLRA permits health care institutions to protect patients from disturbance during their treatment and convalescence by prohibiting employee solicitation and distribution of written materials in areas of a hospital or clinic that are frequented by patients and their families.

On a more general level, many of the Association's members operate business establishments where they regularly receive and entertain customers or patrons on company property. These companies have an abiding interest in the extent to which employers subject to the NLRA may control the use of their property and protect their customer relationships by limiting potentially disruptive solicitation and distribution directed at nonemployees on company premises. Thus, the interests of the *amicus curiae* and its members are affected in a substantial and ongoing way by the

holdings of the National Labor Relations Board and the court of appeals in this case.

STATEMENT OF THE CASE

The relevant facts are detailed in the petition. Briefly, the petitioner operates two acute care hospitals. Both provide treatment to patients with life-threatening illnesses, and both emphasize the importance of family support as a critical part of patient care and convalescence. The hospitals have various sitting rooms, waiting areas and connecting spaces where patients and family members can be together, await procedures and test results, confer with physicians and ponder decisions about treatment. Some of these areas are within designated "patient" or "nursing" units, and some are outside such units.

During a union organizing campaign, hospital employees and full-time union organizers solicited and distributed handouts to employees and nonemployees both on and off the hospitals' premises. In response, the hospitals adopted a joint policy intended to "'avoid disrupting patient care and to prevent disturbing our patients and their families.'" *Stanford Hosp.*, 325 F.3d at 336 (citing NLRB opinion). Among other things, the policy prohibited solicitation of *employees* at any time in "patient care areas," which it defined as "'patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and other families or visitors, and the hallways immediately adjacent to all such areas.'" *Id.* at 337. Some of the lounges and waiting areas encompassed in this definition were located within designated patient or nursing units, and some were outside such units. *Id.* The policy also prohibited employees from soliciting or distributing literature to *nonemployees* on the hospitals' premises at any time. *Id.*

On unfair labor practice charges filed by the union, the National Labor Relations Board (NLRB or Board) held, *inter alia*, that the hospitals' general ban on employee solicitation and distribution activities directed at nonemployees violated Section 8(a)(1) of the NLRA, because the hospitals had not shown that the ban was needed to protect patients. *UCSF Stanford Health Care*, 335 NLRB 488 (2001), *enforced*, 325 F.3d 334 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3268 (Sept. 29, 2003). The Board also held that insofar as the hospitals' policy banned solicitation and distribution directed at employees in lounges and waiting areas outside patient units, it violated Section 8(a)(1), because the hospitals had failed to show that solicitation and distribution in those areas would be likely to interfere with patient care. *Id.*

On review, the D.C. Circuit upheld both of these Section 8(a)(1) findings. With respect to the ban on solicitation and distribution aimed at nonemployees on hospital premises, the court of appeals declared that NLRA precedents make no "substantive distinction between solicitation of fellow employees and solicitation of nonemployees." *Stanford Hosp.*, 325 F.3d at 343. It went on to hold that the employees' right under Section 7 of the NLRA to solicit nonemployees outweighed any countervailing interest shown by the hospitals. *Id.* at 342-45. In doing so, the court of appeals brushed aside as mere "dicta", *id.* at 344, statements by this Court indicating approval of a hospital's rule that read: "There is to be no soliciting of the general public (patients, visitors) on Hospital property." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 486 and 503 n.23 (1978).

In striking down the hospitals' ban on solicitation and distribution in lounges and waiting areas frequented by patients and their families, the court of appeals adopted the NLRB's narrow view of the areas of a hospital in which solicitation and distribution activities are presumptively likely

to be disruptive of patient care. The court specifically declined to follow precedents holding that hospitals lawfully could ban such activities in lounges, waiting rooms, corridors and similar areas frequented by patients and their families, and purported to distinguish this Court's decision in *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). Nowhere in its opinion did the court of appeals take into account evidence that the hospitals' policy left many other areas of the hospitals open for solicitation and distribution activities directed at employees.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The court of appeals' declaration that there is no substantive distinction in federal labor law between solicitation of fellow employees and solicitation of nonemployees is of great concern to employers nationwide, and is particularly alarming to those in the health care field. The court's blunt pronouncement appears to contradict years of NLRA precedents upholding the right of employers to ban workplace solicitations likely to disrupt relations with nonemployees whose patronage and good will are vital to an employer's business, such as a retail store's customers, a restaurant's diners, or a hospital's patients and their families. The decision calls into question all workplace policies that differentiate between solicitation of employees and solicitation of nonemployees. It thus raises an issue of broad national importance warranting review by this Court.

Prior to this decision, employers in health care and other industries could reasonably conclude, based on language in this Court's *Beth Israel* opinion, that they lawfully could adopt "a rule forbidding any distribution to or solicitation of nonemployees" on their property. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 503 n.23 (1978). By striking down precisely such a rule in this case, the court of appeals has created

widespread confusion and uncertainty that only this Court can now resolve.

The court of appeals' refusal to recognize areas such as hospital lounges, sitting rooms and corridors that are frequented by patients and their families as "patient care areas" is also perplexing in light of this Court's express recognition in *Baptist Hospital* of "[t]he increased emphasis in modern hospitals on the mobility of patients as an important aspect of . . . patient care." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 784 (1979). This Court cogently observed that "[s]mall public rooms or sitting areas on the patient-care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families—often during times of crisis." *Id.* If those observations do *not* mean that all such areas of a hospital are within the zone in which rules banning solicitation and distribution are presumptively valid, this Court needs to say so.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECLARATION THAT THERE IS NO SUBSTANTIVE DISTINCTION IN FEDERAL LABOR LAW BETWEEN SOLICITATION OF FELLOW EMPLOYEES AND SOLICITATION OF NONEMPLOYEES RAISES AN IMPORTANT QUESTION THAT WARRANTS REVIEW BY THIS COURT.

This case presents an important question of federal labor law that has nationwide ramifications, not only for health-care but potentially for other industries as well. There is no dispute that employees have a right under Section 7 of the NLRA, 29 U.S.C. § 157, to communicate with both fellow employees and nonemployees about matters such as their desire for unionization and their concerns about terms and

conditions of employment. But, as this Court has long recognized, that right does not exist in a vacuum. Rather, it must be accommodated with important employer rights and interests, including the rights of employers "to maintain discipline in their establishments," *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945), to control the use of their property, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and to command loyalty and prevent disparagement of their products and services by their own employees. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953). At issue in this case is the extent to which the NLRA also accommodates the right of employers to control the nature and substance of their employees' interactions with customers, patrons and other nonemployees on the employers' premises.

Solicitations directed at nonemployees have a potential to harm an employer's business interests in ways that communications solely among fellow employees do not. For example, solicitation of nonemployees may disturb the ambience of a business establishment and undermine good will for the employer. Just as Americans tend to resent uninvited calls to their homes by telephone solicitors, many are likely to feel alienated and uncomfortable when approached and solicited by union activists at establishments to which they have gone to shop, dine, be entertained, receive treatment or transact other business. Many will react by taking their business elsewhere. Thus, a substantive distinction between solicitation of employees and solicitation of nonemployees exists in the real world, whether the D.C. Circuit recognizes it or not.

Indeed, recognition of this substantive distinction has long been implicit in NLRA precedents and is essential to a proper administration of the Act. Thus, the NLRB and the courts have long approved greater restrictions on solicitation in work environments where nonemployees are likely to be present than where only employees are involved. For example, they

have upheld total bans on solicitation and distribution activities on the selling floors of retail stores. *See Famous-Barr Co.*, 59 N.L.R.B. 976 (1944), *enforced sub nom. NLRB v. May Dep't Stores Co.*, 154 F.2d 533 (8th Cir. 1946). Similarly, the Board has held that "restaurants, . . . because of the nature of their business, may prohibit solicitation . . . in areas in which customers are likely to be present." *Marriott Corp.*, 223 N.L.R.B. 978 (1976) (footnote omitted).

Nowhere has this substantive distinction been more clearly recognized—at least until now—than in the hospital context. In 1978, this Court observed that "in the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978). The following year, the Court reiterated and expanded upon the importance of this interest in *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-85 (1979). Thus, it is a hospital's interest in protecting a class of *nonemployees*—its patients—against the potentially disruptive effects of solicitation, and thereby preventing interference with the hospital's basic business mission—patient care—that justifies its imposition of greater restrictions on solicitation affecting these nonemployees than would be allowable if only fellow employees were involved. But this type of interest, while particularly compelling in the hospital context, is not unique to the health-care field. Employers in virtually all fields have a significant, ongoing business interest in preventing employees from engaging in potentially disruptive encounters on their premises with nonemployees on whose good will the employers' business depends.

The court of appeals' suggestion that employers have no greater right to restrict solicitation of nonemployees than of employees on their premises thus flies in the face of important NLRA principles and raises serious concerns for employers, not just in health-care, but throughout industry. It

creates doubt in an area where clear rules are needed. Review by this Court is urgently needed to relieve these doubts and clarify this important area of NLRA law.

II. REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE APPARENT CONFLICT BETWEEN THE COURT OF APPEALS' HOLDING AND THIS COURT'S STATEMENTS IN *BETH ISRAEL* INDICATING APPROVAL OF "A RULE FORBIDDING ANY DISTRIBUTION TO OR SOLICITATION OF NONEMPLOYEES."

Employers need clear rules if they are to operate effectively within the law. Many employers, particularly in the health-care field, undoubtedly thought this Court was providing such a clear rule when it wrote, in an opinion dealing with employee solicitation and distribution in a hospital, that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 503 n.23 (1978). Indeed, the Court specifically noted that the employer in that case "in fact, has such a rule," *id.*, and recited the rule in its opinion: "There is to be no soliciting of the general public (patients, visitors) on Hospital property." *Id.* at 486 (citation omitted).

While it is perhaps true, as the court of appeals here said, that the above-quoted statements are technically dicta, since the hospital's blanket ban on solicitation of nonemployees on its property had not even been challenged in *Beth Israel*, those statements in this Court's opinion, authored by Justice Brennan, clearly seemed to be suggesting a lawful means of regulating workplace solicitation that was available as an alternative to the policy that was in fact challenged in that case. Indeed, Justice Brennan observed that the NLRB had "not foreclosed" the hospital from adopting such a blanket ban on solicitation of nonemployees. *Id.* at 503. He even went so far as to point out an advantage of such a rule, noting

that it "could be readily enforced" at the hospital. *Id.* at 503 n.23.

In light of these statements, it would not have been unreasonable, following the issuance of this Court's *Beth Israel* decision, for other hospitals to adopt rules modeled after Beth Israel's general ban on "soliciting of the general public (patients, visitors)" on hospital property. Indeed, given the strong indication in that case that this Court would view such rules as uncontroversial, even employers outside the health-care field reasonably could interpret that decision as an endorsement of rules banning solicitation of non-employees on their premises.

Thus, the D.C. Circuit's decision to strike down a hospital rule virtually identical to the one Justice Brennan described with such apparent approval in *Beth Israel* comes as a shock to employers throughout the country. The result is further confusion that only this Court can now alleviate.

III. REVIEW BY THIS COURT IS NECESSARY TO ELIMINATE CONFLICT AND CONFUSION OVER THE DEFINITION OF "PATIENT CARE AREAS" WITHIN WHICH HOSPITAL RULES PROHIBITING SOLICITATION AND DISTRIBUTION ARE PRESUMPTIVELY VALID.

Also productive of confusion and conflict in the law is the court of appeals' adoption in this case of a narrow definition of the "patient care areas" of a hospital within which rules banning solicitation and distribution are presumptively valid. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978). At bottom, the court of appeals failed to recognize the implications of the basic point this Court emphasized in *Baptist Hospital—i.e.*, that an important aspect of patient care in modern hospitals is patient mobility. *NLRB v. Baptist Hosp.*, 442 U.S. 773, 784 (1979). That point is even more true today.

This Court clearly understood that hospital lounges, sitting rooms, corridors and other areas where patients and their family members meet, await procedures and test results, confer with doctors and participate in convalescent activities are all important patient care areas, even if they are not located within areas specifically designated as "patient" or "nursing" units. Thus, the Court observed in *Baptist Hospital* that, in modern hospitals, "[p]atients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the corridors where patients often are encouraged to walk, or visit with their families." *Id.* at 789 n.16.

Although the court of appeals quoted from this Court's *Baptist Hospital* decision on this point, *Stanford Hosp.*, 325 F.3d at 341, it illogically concluded that areas outside designated patient or nursing units were not "patient care areas" in which solicitation would presumptively be disruptive, because it found that the petitioners had failed to prove that solicitation in those areas would in fact be disruptive. *Id.* at 342. Thus, the court purported to distinguish its own prior decisions in *Baylor University Medical Center v. NLRB*, 578 F.2d 351 (D.C. Cir. 1978) (upholding a ban on solicitation in hospital corridors), and *Baylor University Medical Center v. NLRB*, 662 F.2d 56 (D.C. Cir. 1981) (upholding a partial ban on solicitation and distribution in a hospital cafeteria), on the grounds that the hospital in those cases had presented evidence that solicitation in its corridors and cafeteria would disrupt patients and visitors, while the court found that Stanford had presented no such proof in this case. But that reasoning simply denied Stanford the benefit of the presumption to which it was entitled if, in fact, the areas in question were "patient care areas."

In *Baptist Hospital*, this Court called upon the NLRB to frame clear rules governing solicitation and distribution in

hospitals, taking into account that patients are "cared for in a variety of settings" extending beyond immediate treatment rooms to a wide variety of other areas frequented by patients and their families. *Baptist Hosp.*, 442 U.S. at 789 n.16. Yet, twenty-four years later, the law on this point is still characterized by confusion and conflict. The petition in this case provides an opportunity for this Court to revisit this issue and provide additional, much-needed guidance.

CONCLUSION

The issues presented in this case are of great importance not only to the health-care field, but to industries in general. For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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